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Nos. 23, 24 and 34

IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE CEMENT INSTITUTE, *et al.*; AETNA PORTLAND CEMENT COMPANY, *et al.*; BLAINE S. SMITH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A TO BRIEF OF RESPONDENTS

A TOPICAL DIGEST OF THE EVIDENCE

VOLUME II

Part III—Cement Pricing—Under the NRA Code; Open Price Filing
Part IV—Sealed Bids to Government Agencies
Part V—Compilation and Distribution of Freight Rate Information

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Corrections to Volume II

Page 692, fn. 1—Should read "*Infra*, Part X A, p. 1818".

" 941, line 8—Change "Also in the Code period" to read "Also prior to the Code period".

" 1022, fn. 2—Should read "*Id.*" instead of "*Supra*".

" 1058, line 27—Change fn. 16 after "these errors" to read fn. 17.

" 1058, line 30—Delete fn. 17 after "102,250 persons".

" 1059, line 18—Change "102,000" to "102,250".

" 1059 —Delete fn. 19.

" 1063, line 5—Change "page 66" to read "page 1064".

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PART III

CEMENT PRICING—UNDER THE NRA CODE; OPEN PRICE FILING

[As noted in the Foreword to Appendix A, respondents have assigned error to the action of the Commission in receiving in evidence or giving any consideration or weight in making its Findings to all of the evidence digested in this Part.]

A. Pricing Provisions in the Code.

1. Code Effective December 7, 1933

Article IX of the NRA Cement Code, by its terms became effective on December 7, 1933,[1] ten days after its approval by President Roosevelt. It contained three basic pricing requirements (1) for filing and publication of cement prices, (2) that prices so filed might be changed, but only after the expiration of five days from the filing of a notice of the change, and (3) that competitors might meet filed prices but not deviate therefrom, except by filing notice of change and publication. It also contained a provision for the investigation and treatment by the Code Authority of filed prices which were in violation of the Code.[2] The relevant provisions of Article IX were as follows:

> "1. Each member of the industry shall file its prices and all terms and conditions of sale with the Code Authority within five (5) days after the effective date of this Code and make same public by broadcast quotations to the trade, so that competitors, the trade, and the buying public may at all times have accurate information relative thereto,

[1] Com. Ex. 557, pp. 325, 344.

[2] Com. Ex. 557, pp. 336-337.

and no member of the industry shall deviate therefrom except in the manner hereinafter provided.

2. Any member of the industry may from time to time change or revise its prices by filing notice thereof with the Code Authority, and no member shall anticipate, by quotation, sale, contract, or otherwise, any change or revision until after the same shall have been on file at least five (5) days at the office of the Code Authority. At the expiration of such five (5) day period the said changes or revisions may, unless the effective date thereof shall be extended, be made effective, and thereupon shall be made public in the manner provided in Section 1 hereof.

3. Any member of the industry may meet the prices, terms, and conditions of sale established by the above method, as of their effective date, and no member of the industry shall deviate from the prices, terms and conditions of sale, so established, except in the manner above stated, and all members meeting such changes shall make same public in the manner provided in Section 1 hereof.

* * *

5. If the Code Authority has reasonable cause to believe, and the member filing same shall have been so notified, that any price filed at its office, as above provided, represents a price made pursuant to a violation of any provision of this Code, the Code Authority may, by notice to such member, extend the effective date of such price for a period of not more than ten (10) days in order that investigation may be made by the Code Authority pursuant to the provisions of Section 2, Article VIII."

2. Amended Code Effective May 21, 1935

The Code was amended and superseded, effective on May 21, 1935.[1] The amended Code was operative for only six days until May 27, 1935, the date of the *Schecter* decision. Article VIII of the amended Code contained the

[1] Com. Ex. 560, pp. 1, 23.

new basic pricing provisions which conformed substantially to the old Article IX, except that it provided (1) for filing of prices "with a confidential and disinterested agent of the Code Authority" instead of with the Code Authority itself, (2) a specific procedure for immediate notification to all interested members of the Industry by the agent of the Code Authority with respect to price changes, and (3) a prohibition against price fixing if inconsistent with the purposes of the Code. It omitted the previous specific provision with respect to investigation and treatment of prices filed in violation of the Code.[2]

3. Code Provisions Were the Law of the Land

Section 3b of the National Industrial Recovery Act (48 Stat. 195; approved June 16, 1933) specified that the provisions of an approved Code "shall be the standards of fair competition for such * * * industry" and that "any violation of such standards * * * shall be deemed an unfair method of competition * * * within the meaning of the Federal Trade Commission Act". It gave the United States District Courts jurisdiction to restrain violations of any approved Code and imposed the duty of enforcement upon the several district attorneys. It constituted "any violation of any provision" of such Code a misdemeanor punishable by a fine of $500 for each offense. The relevant portions of Section 3 are footnoted.[1]

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[2] Com. Ex. 560, pp. 13-14.

[1] "(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

Commission witnesses as well as executives of various respondents testified concerning the force of the Code as follows:

Dr. Morgan, Chairman of TVA, said that the Code "was the law of the land at the time."[2]

Hanahan, President of Volunteer, said that his company felt obligated to adhere to the Code and "whatever was prescribed in there we thought was law, and we tried to follow it just as close as we could."[3]

Brobston, President of Hercules, did not consider the Code an agreement, but "something I was forced to do under the law."[4] He said further that Hercules followed the Code where it was told to do so by its attorneys and that it was the law.[5]

Coogan, Vice President of Alpha, "looked upon the Code as a matter of compulsory acceptance,"[6] and, under

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(c) The several district courts of the United States are hereby invested with jurisdicition to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General to institute proceedings in equity to prevent and restrain such violations.

* * *

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense." (pp. 196-7, U. S. Statutes, vol. 48)

[2] (C) Tr. 2116-17.

[3] (R) Tr. 38639.

[4] (R) Tr. 26335.

[5] (R) Tr. 26065, 26068-69.

[6] (R) Tr. 24296-99.

his concept of agreement, as "a legal agreement" which "we were forced to follow."[7] By this, he explained, he did not mean "an agreement among manufacturers."[8]

Lucas, Vice President of Petoskey, understood that under the Code, his company "was obligated to adhere to the filed prices."[9]

Bowen, Vice President of Lehigh, testified that the intent of their contract form was to incorporate everything that was required "to insure our compliance with the Code."[10]

Ackerman, Vice President of Lawrence, said that his company's purpose in initiating the practice of making a price reduction retroactive for five days was to comply with the requirements of the Code.[11]

Hartley, Sales Manager of the non-respondent South Dakota, testified that his company conformed to the rulings of the Code and got rulings from the Code Authority from time to time.[12]

Dannelly, Vice President of National, declined to bid on an invitation of the State of North Carolina because "under the Code we were prevented from quoting in accordance with" the proposal. He said that this action was influenced by instructions of Nicholson, President of National, "to bid in conformance with what we then thought to be the provisions of the Code."[13]

Pearson, Secretary-Treasurer of Cumberland, testified that his company was required by law to observe filed prices under the Code.[14]

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[7] (R) Tr. 24275-76.
[8] (R) Tr. 24299.
[9] (R) Tr. 38831.
[10] (R) Tr. 36815-16; Resp. Ex. 1128 A-B.
[11] (R) Tr. 31261-62.
[12] (C) Tr. 12743.
[13] (R) Tr. 39710-12; See Resp. Ex. 3054.
[14] (R) Tr. 39851.

EXECUTIVE ORDER 6246

On August 10, 1933, less than two months after NIRA became law, and approximately four months before the Cement Code became effective, the President signed Executive Order 6246 which provided, in substance, that every contract for supplies entered into by the United States or any of its agencies or instrumentalities should "require" that the contractor comply with all provisions of the applicable code for the industry failing which the Government "may by written notice * * * terminate the contractor's right to proceed with the contract. * * *"

On October 10, 1933, Comptroller General McCarl, referring specifically to Executive Order 6246, ruled that the provisions of the Cement Code, as well as of codes for other industries, did not apply to sales to the United States. On December 22, 1933, the Code Authority wired General Johnson, NRA Administrator, protesting this ruling as being "in conflict with the Executive Order". The Code Authority's telegram stated, in part, that, under the Code, "all members are required to file their prices and adhere thereto". The Assistant Compliance Director of NRA replied immediately that NRA was "rigorously contesting this ruling by the Comptroller General and pressing for other arrangements which we hope will nullify it". Copies of the Cement Code Authority's telegram and of NRA's reply were forwarded to all members of the industry on December 27, 1933.[15]

EXECUTIVE ORDER 6646

On March 14, 1934, the President signed Executive Order 6646 entitled "Government Contracts and Contracts Involving The Use of Government Funds". By its terms a certificate of code compliance or provisions there-

[15] Com. Ex. 1037.

for were a *sine qua non* in all bids, invitations and purchase orders not only of any agency or instrumentality of the United States, but also of any State, municipality, local subdivision, person or corporation, where the project involved the use of federal funds. The Order barred consideration or acceptance of any bid which did not meet this requirement. The provisions of the Order are footnoted.[16]

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[16] "[No. 6646]

EXECUTIVE ORDER

Government Contracts and Contracts Involving The Use of Government Funds

By virtue of authority vested in me as President of the United States, it is hereby ordered that:

1. (a) All invitations to bidders hereafter promulgated by or in behalf of any executive department or independent establishment or other agency or instrumentality of the United States, including Government-owned and Government-controlled corporations (all of the foregoing being hereinafter described as agencies of the United States), shall contain a provision to the effect that no bid will be considered unless it includes or is accompanied by a certificate duly executed by the bidder stating that the bidder is complying with and will continue to comply with each approved code of fair competition to which he is subject, and if engaged in any trade or industry for which there is no approved code of fair competition, then stating that as to such trade or industry he has become a party to and is complying with and will continue to comply with an agreement with the President under section 4 (a) of the National Industrial Recovery Act.

(b) No bid which does not comply with the foregoing requirements shall be considered or accepted.

(c) All contracts and purchase orders authorized by any agency of the United States shall contain a provision to the effect that the party or parties awarded any such contract or purchase order shall comply with each approved code of fair

competition to which it is subject and if engaged in any trade or industry for which there is no approved code of fair competition, then, as to such trade or industry, with an agreement with the President as aforesaid; and the United States shall have the right to cancel any contract for failure to comply with such provision and make open market purchases or have the work called for by the contract otherwise performed, at the expense of the contractor.

(d) No agency of the United States and no Government contractor or supplier shall hereafter accept or purchase for the performance of any contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, or in case there is no approved code for the whole or any portion thereof, then, to that extent, with an agreement with the President as aforesaid.

(e) The foregoing provisions of this order shall likewise apply to all contracts and purchase orders authorized by any State, municipal corporation, local subdivision, person, or corporation in connection with projects carried out or to be carried out, wholly or in part, with funds loaned or granted by any agency of the United States, and all contracts and agreements for the making of any such loan or grant shall contain a provision requiring the State, municipal corporation, local subdivision, person, or corporation receiving such loan or grant, to comply with the provisions of this order; provided that this paragraph shall not be construed as requiring the restriction of the use of materials to those produced within the United States nor to require price differentials in favor of such materials.

2. Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract, or subcontract, or accepts any purchase order, may be punished as provided in section 10(a) of the National Industrial Recovery Act, by a fine of not to exceed Five Hundred Dollars ($500) or imprisonment not to exceed 6 months, or both, and in event of any such false certification by any such person, any contract, subcontract, or purchase order to which he is party secured by or in furtherance of any such proposal or bid may be canceled by the other party thereto, and the unfinished portion thereof completed at the

This Order was modified on June 29, 1934 by Executive Order 6767, to permit bids to the United States and the other public authorities referred to at a price not more than 15% below that filed by the bidder pursuant to an approved code.[17]

The Code Authority in its General Letter to the industry of March 29, 1934, emphasized with underscoring that pursuant to Executive Order 6646 a bid submitted to any

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expense of the person guilty of such false certification and his sureties, if any.

3. Whenever a dispute shall arise between any agency of the United States and any bidder, contractor, supplier, or other person as to compliance with any code of fair competition or with an agreement with the President as aforesaid in connection with any proposal, bid, contract, subcontract, or purchase order mentioned herein, the Administrator for Industrial Recovery, or such agency as he shall designate, shall decide such dispute and, for the purposes of action under this Executive order, such decision shall be final and conclusive; but the determination of such agency of the United States shall be effective for all purposes pending such decision.

4. All provisions of approved codes of fair competition shall apply to the making and performance of contracts with or sales to agencies of the United States.

5. The Administrator for Industrial Recovery may make exceptions in specific cases or otherwise under this order whenever such action shall be recommended to him by any agency of the United States and when in the judgment of the Administrator justice or public interest will best be served thereby.

6. Any provisions of Executive Order No. 6246, signed August 10, 1933, or any other Executive order, and any rule or regulation in conflict herewith are hereby to that extent modified and rescinded.

The White House

March 14, 1934. FRANKLIN D. ROOSEVELT."

[17] Com. Ex. 179. The effect of this modification on bids by cement manufacturers is discussed under Part III, subd. D, *infra*, p. 664.

department of the United States government "must comply and certify to * * * compliance with all the provisions of the Code" failing which it could not be considered. The letter referred also to the "mandatory requirements" of the Code, such as that "it is mandatory that all prices * * * must have been on file with the Code Authority at least five days before such prices are legal or valid under the Code."[18]

On February 10, 1934, the Code Authority advised Oregon that a member of the industry was "in violation of [the] Code if he does not bid under its provisions irrespective of [the] ruling [of the] Comptroller General".[19]

Reiter, later chairman of the Cement Code Authority, testified that the Comptroller General "subsequently changed his mind * * * or at least it was decided that the Code applied to Government purchases".[20]

In conformity to Executive Order No. 6646 the "Standard Government Form of Invitation for Bids" then used by the War Department contained requirements entitled "Compliance With Code of Fair Competition".[21] To the same effect are the certificates of compliance contained in bids of the various manufacturers to the War Department during the same period.[22]

Dr. Morgan of TVA testified that his Authority's contracts contained a provision for cancellation if found to be in contradiction of the Code.[23] The record contains specimens of certificates of compliance on bids to TVA.[24]

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[18] Com. Ex. 716 C.

[19] Com. Ex. 753 B.

[20] (C) Tr. 3496-97.

[21] Resp. Ex. 1082 A-D; Com. Exs. 161 A, 167 A-B.

[22] Resp. Exs. 888, 2027, 2993 F, 2995 G, J, N.

[23] (C) Tr. 2116-17.

[24] Resp. Exs. 2914 T, 2918 U, W.

The Department of the Interior and its Reclamation Bureau likewise required compliance certificates.[25]

William H. Davis, National Compliance Director of NRA, wrote to "All Code Authorities" on March 22, 1934 "that government stands ready, able and willing to back you up" and that "the administration is now going forward with court action in cases of Code violations * * * in collaboration with the Department of Justice". His letter requested the Code Authorities to "promptly forward to the Compliance Division * * * all cases suitable for court action". Copies of this letter were forwarded by the Cement Code Authority to all members of the industry on April 4, 1934.[26] These letters were admitted into evidence over objection of Commission's counsel.[27]

While certificates of compliance with the Code were required, nevertheless the Federal agencies did not always enforce such compliance. On the Bonneville Dam letting, which was in March, 1934, early in the Code period, the War Department rejected all bids as not having been filed for five days and thus being in violation of the Code.[28]

In contrast with the Bonneville letting, the War Department refused to permit withdrawal by Aetna, the successful bidder on the Algoma Harbor letting of May, 1935, and said: "There is no authority to permit withdrawal of your bid * * * because it may not be in accordance with the

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[25] Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 20764-69.

[26] Resp. Ex. 2431 E-F.

[27] (R) Tr. 34315.

[28] Com. Ex. 159 (59); Reiter, Chairman, Cement Code Authority (C) Tr. 3494-95.

For related correspondence between the Code Authority, NRA and the War Department, see Com. Ex. 159 (24-25), Com. Ex. 159 (27), Com. Ex. 159 (55) and Com. Ex. 159 (56).

Cement Code requirements as the bid includes the required certificates as to Code compliance.'"[29]

On the Norris and Joe Wheeler Dam lettings in March, 1934, TVA took a similar position, that while it was required under the Executive Order to secure the bidders' certificates of compliance, yet if they did not comply, the matter was then one in the hands of the NRA administration "and * * * We would not stop making a purchase if we had the signed certificate. * * *"[30] There the Code Authority notified TVA of several violations of the Code.[31] Garity, TVA Director of Purchases, requested the names of the violators.[32] The Code Authority explained to Garity the applicable mandatory price filing requirements[33] and sent him an analysis of the bids submitted by each of the fourteen bidders, specifying in detail the manner in which their bids violated the Code, whether wholly or in part, such as that "the price quoted was not on file with the Code Authority". This analysis showed that only two bidders, namely, Volunteer and the Washington Building Lime Company, were "in strict conformity" with the Code.[34] Penn-Dixie was awarded 45,000 barrels on the Norris Dam where its bid violated the Code and none on the Joe Wheeler Dam where it was in strict conformity.[35] Garity testified that the successful bidders were determined (without reference to Code compliances) by taking the three mills near-

[29] Resp. Ex. 2030. For related communications between the Code Authority, Aetna and War Department, see Resp. Ex. 2027 A-B, Com. Ex. 986 B and Resp. Exs. 2028, 2029.

[30] Garity, TVA Director of Purchases (C) Tr. 2640-41.

[31] Com. Ex. 399 F.

[32] Com. Ex. 399 G.

[33] Com. Ex. 398 A-B.

[34] Com. Ex. 398 C-E.

[35] (R) Tr. 38314-15; Com. Ex. 398 E.

est to the projects which could and would make delivery based on their ability to supply cement when needed.[36]

Taylor, Assistant Chief of the Engineering Department of the Bureau of Reclamation, also testified that although the certificate of compliance was required by his Bureau, it was not enforced.[37]

The Code Authority reported in its bulletin of June 9, 1934, that the efforts of the industry members to comply with the Code were "almost entirely cooperative."[38] In this connection, Coffin, President of the Cement Institute, had written to all members urging them to support the objects of the Code and everything that the Code provided for.[39] The Authority reported further that several members who unintentionally violated the Code by bidding to public bodies at lower than their filed prices, when, like Aetna on the Algoma Harbor letting (*supra*, p. 627), they were not permitted by the purchasers to withdraw, voluntarily penalized themselves by purchasing from competitors at the filed prices and invoicing the public bodies at the bid prices.[40] The record contains several illustrations of this. Thus Letzkus, Sales Manager of Pittsburgh, advised the Code Authority on May 23, 1934, that his company had made an erroneous bid of an unfiled price from which it could not withdraw and that it was paying for its error by shipping through Green Bag, Pa. and paying the latter the correct filed price. In his letter Letzkus said in part:

> "• • • we are paying for the error.
>
> Personally, I think it would be much more sensible for us to ship it ourselves. In that way, we would have been able to at least break even at the

[36] (C) Tr. 2638.

[37] (C) Tr. 20764-69.

[38] Resp. Ex. 183 C.

[39] Brobston, President, Hercules (R) Tr. 26252-53.

[40] Resp. Ex. 183 C.

low price, instead of losing an actual twenty-five cents per barrel, which, of course, isn't economical, but I presume that common sense and economics are not considered so much in business any more and that the important point is to match up with some Code, whether it is common sense or not."[41]

The Code Authority replied complimenting Pittsburgh and giving other examples of such action as follows:

"I want to compliment you on your method of handling this, as I think you are showing the proper spirit and the proper way to live up to your Code of Fair Competition.

I also want to call your attention to the fact that you are not the only company that has done this. I know of two others that have paid for their errors, one to the tune of 15,000 barrels, on which it had another company ship and they paid the difference. If the company making the error were permitted to make the shipment, you can readily understand how easy it would be for a company to claim an error on a large order and get a lot of business to which it was not entitled."[42]

The Code Authority minutes of May 14-15, 1934 mention a similar incident where a subsidiary of International (Lone Star) bid an unfiled price to New York State and paid for its error by shipping through a competitor at the filed price.[43]

B. Origin of Pricing Provisions of Code.

Evidence dealing with the preparation and approval of the Code as a whole is digested in Part XII A. Evidence relating to the open price filing provisions is digested here.

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[41] Com. Ex. 984 J.

[42] Com. Ex. 984 K.

[43] Com. Ex. 559 A-C.

1. Drafts

Section 3 of the National Industry Recovery Act (48 Stat. 195; approved June 16, 1933) provided for application to the President for approval of the Code by a trade association "truly representative" of the industry. The pertinent statutory provisions are footnoted.[1] Officials of the NRA also suggested trade associations as the medium through which Codes "could properly be submitted for approval".[2]

The Code for the cement industry was proposed and submitted by The Cement Institute which showed that it was authorized to represent the industry under the statute, with the following statement:

[Italicized part quoted in Fdgs. Par. Seven (p)]

"The Institute includes 96 percent in number and 98 percent of the producing capacity of all Portland Cement producers in the United States, and is authorized to represent the industry under the National Industrial Recovery Act, the policy and purposes of which are set out in Section 1, Title I, thereof."[3]

There were present at the Institute and District Trustees' meetings at which the Code was drafted and discussed a total of 46 respondent manufacturers and 4 non-respondent manufacturers in person or by proxy.[4] Representa-

[1] "Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof * * *"

[2] Reiter, Chairman, Code Authority (C) Tr. 16718.

[3] Com. Ex. 556, p. 1.

[4] Com. Exs. 605-13, 637, 828-6 T; Resp. Ex. 2173.

tives of the NRA were present at various meetings.[5] The Code was compiled in collaboration with these Government officials[6] and progress was reported to the members of the industry.[7]

Murray, Deputy Administrator of the NRA, testified that the procedure was for the industry to present its Code, and if it was not satisfactory to the Government that it was negotiated with members of the industry and labor and consumer representatives "until something satisfactory to all was arrived at, and then approved".[8]

Hartley, Sales Manager of the non-respondent South Dakota State Cement plant, testified concerning participation in drafting of the Code:

> "Q. You mean you sat in on the drafting of the Code at the beginning? A. Yes, sir.
>
> Q. I said your first contact? Were you invited to sit in on drafting the Code at the beginning? A. Well, I attended some——
>
> Q. Did you sit in on those discussions? A. Yes; we sat in on the discussions.
>
> Q. And were you given an opportunity at those meetings to express your views as to what should be included in the Code? A. Yes, sir.
>
> Q. And as finally adopted, can you tell us now whether it contained any provisions that you objected to? A. Oh, as I remember, there were no material differences, and no particular objection to any of the provisions. I don't remember any objections."[9]

The following proposals and discussion relative to pricing provisions are found in the minutes of various meetings

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[5] Coogan, Vice President, Alpha (R) Tr. 24399; see Com. Ex. 612.

[6] Reiter, Chairman, Code Authority (C) Tr. 16719; Koch, Vice President, Lone Star (R) Tr. 33191.

[7] Warren, G. E., Vice President, Southwestern (R) Tr. 29196.

[8] (C) Tr. 96.

[9] (R) Tr. 41540.

of the Institute and District Trustees during the period from June 15, 1933 to October 25, 1933:

1. At the meeting June 27-28, 1933 a proposal by Blaine S. Smith of Penn-Dixie for an amendment with respect to "established prices * * * not in the public interest or * * * unfair to the trade, to employees or to competitors in other districts."[10]

2. At the meeting of July 26, 1933 a proposal for redrafting "for the purpose of complying with the provision of fixing minimum prices in accordance with the tax provision of the NIRA" and that "such prices shall in no event yield in excess of 12½% of the adjusted, declared value of capital stock".[11]

3. At the same meeting an amendment prohibiting "the sale by any manufacturer, or his employees of any commodity at a discriminatory price."[12]

4. At the meeting of August 15-16, 1933, Young, President of Lehigh, who was chairman of the committee on pricing provisions, stated that his committee felt such provisions were the very heart of the Code and that a method of arriving at prices is divided into two general classes—group action and individual action.

Using "the procedure put into effect by the Rayon Silk Dyeing Code," the Committee made the following recommendation:

> "The Cement Industry Committee shall establish and from time to time revise delivered prices for cement. No manufacturer shall deviate from or revise or change such delivered prices once determined and published by the Cement Industry Committee."[13]

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[10] Com. Ex. 606 E.

[11] Com. Ex. 607 D.

[12] Com. Ex. 607 E.

[13] Com. Ex. 608 L.

5. At the same meeting the Washington Committee recommended the following provisions with respect to fair prices, open price filing and non-discrimination:

> "c. The prices of cement shall be reasonable, fair to the public and to competitors, and shall bear such relation to costs as will permit, payment to Employees wage rates sufficient to provide, when employed, a decent standard of living, and fair returns on invested capital, provided, however, that during the emergency covered by the period of this Code the average net prices received shall not yield manufacturers annual returns in excess of 12½ per cent of the adjusted declared value of their capital stock as provided in Section 216 (a) of Title II of the Act.
>
> d. No manufacturer shall discriminate in its prices or terms and conditions of sale at the same time and place of delivery, between purchasers or users in the same class and similarly situated. Each manufacturer shall file its prices, terms and conditions of sale, and all revisions and changes thereof with The Institute and make same public by broadcast quotations to the trade so that the buying public, the trade and competitors may at all times have accurate information, and no manufacturer shall deviate from its published prices, terms and conditions of sale, provided however, nothing herein contained shall be construed as in any measure impairing the right or restraining the freedom of any manufacturer to make and publish such changes in its prices as from time to time may be reasonable, or may be necessary to meet bona fide competition, or to conform to the provisions of this article, it being the purpose hereof to adopt and pursue an open price policy throughout the industry." (Com. Ex. 608 D)

This proposal did not contain a five-day limitation on filing notice of a price change such as was included in the approved Code (*supra*, p. 617).

6. At the meeting of August 24, 1933, further changes were submitted which approximated the approved Code, except that the Institute, rather than the Code Authority, was designated as the agency for handling price filing.[14]

7. At the meeting of the trustees of September 14-15, 1933, which coincided with the date of the public hearing on the Code at Washington[15], a request from cement dealers to eliminate the provision for publication of filed prices to the buying public was rejected.[16] At the same meeting a motion was carried to instruct the Washington Committee "to limit price and production control, until such time as production is 55% capacity; if they find it necessary to do so * * *".[17]

A draft which was submitted to the NRA on July 19, 1933 contained provisions for price filing similar to the approved Code. It contained, in addition, the following provisions, later eliminated, relative to deflection of business by a minority who engaged in unfair competition, and selling at delivered prices except to the Federal Government where land grant rates were involved:

> "1. Portland Cement, being a standardized product, is so highly competitive that a difference in price of only one cent (1¢) a barrel will deflect the business from one manufacturer to another and turn orders, large and small, away from the fair, constructive, and cooperative majority in the Industry, to the recalcitrant wasteful minority therein who engage in unfair competition.
>
> A very small minority indeed, even one manufacturer alone, by persisting in such unfair competition can and frequently has completely demoralized the markets within the scope of his trade area. The

[14] Com. Ex. 610 A-C.

[15] Resp. Ex. 135 A.

[16] Com. Ex. 611 E.

[17] Com. Ex. 611 F.

means considered necessary by this Applicant (which truly represents all but a small fraction of the manufacturers) to protect the Industry against the unfair competition of the small, recalcitrant, and destructive minority therein, subject to the approval of the President, are presented in this basic Code and the Supplement thereto, which constitute the plan hereby proposed to stabilize our markets and thereby effectuate the policy of the Act.

[Italicized part quoted in Fdgs. Par. Seven (p)]

a. Except in cases where the Committee permits otherwise, all cement quotations and sales shall be F.O.B. point of delivery, and all cement shall be sold on such delivered basis; provided, however, that in making quotations and sales to the Federal Government, cement shall be sold F.O.B. plant, in the event land-grant rates may be availed of or by the Federal Government in arriving at the delivered cost."[18]

Reiter, Secretary of the Code Authority, did not know why the above provisions of the draft of July 19, 1933 were not included in the approved Code, but he knew sometime after the Code was in effect that some industry members favored a provision for sales to the Government F.O.B. plant.[19] A provision similar to that which was eliminated for sales at delivered prices had been proposed at a meeting of districts 5, 7 and 8 of the Institute held on June 23, 1933 at Chicago.[20] At the same meeting there had been a related proposal which was not carried into the approved Code for establishment and revision of delivered prices by manufacturers in each Bureau of Mines district subject to limited disapproval by the Institute trustees.[21]

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[18] Com. Ex. 556, pp. 6, 7.

[19] (C) Tr. 3032-34.

[20] Com. Ex. 828-6 T, 6 Z.

[21] Com. Ex. 828-6 Z, 7 A.

Suggestions and criticisms were received during the drafting from various members of the industry as well as from outside sources and the NRA itself. (Part XII, p. 2132 *et seq.*) Among these was a letter from Marquette dated August 9, 1933, which asserted that the draft of July 19, 1933 had not been properly submitted for consideration of the industry and which commented on the then proposed pricing provisions to the following effect: that the pricing article had no place in the Code; that while several of its provisions might be rejected, for the most part it went too far afield and attempted to set a goal impossible of attainment; that the provision permitting sales below cost in order to meet an established market price should be eliminated; that the provisions for the establishment of prices by districts and submission to the Board for approval should be eliminated.[22]

The letter stated it was understood that the NRA Administrator "required" provision for "agreement not to sell below cost".[23] The letter was read at the meeting of the trustees held on August 15-16, 1933 and some of its objections were met. Others already had been eliminated.[24] Colburn, Vice President of Marquette, testified that his company knew the Code was being formulated by the industry in the spring of 1933, but that it had no part in the drafting at that time. Subsequently, he attended practically every industry meeting in connection with the formulation of the Code.[25]

Public Hearing of September, 1933

On August 31, 1933 approximately two weeks before the public hearing, Conn, President of the Institute, wrote to

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[22] Com. Ex. 2603 A, D.

[23] Com. Ex. 2603 F.

[24] Com. Ex. 608 H-J.

[25] (R) Tr. 39033, 40005-07.

Sunderland of Ash Grove and Young of Lehigh, who were members of the Committee which drafted the Code, about the importance of preparing to reply to criticisms and objections which might be offered. His letter follows:

[Italicized part quoted in Fdgs. Par. Seven (p)]

"The Washington Contact Committee in reviewing the procedure at the public hearing (date for which it is expected will be announced to-day), feels that it is important that preparations should be made in advance to reply to criticisms and objections which may be offered at the hearing from within or without the industry. *We therefore request that you gentlemen give consideration to the provisions in the Code and in the supplements thereto relating to price control (including defense of present level of prices) and the universal practice of quoting delivered prices only, so that you may be prepared to make a brief statement in support of any phase of this subject, if called upon to do so.*

The Contact Committee will be continuously in session at Washington for three or four days prior to the meeting, and we shall hope to have an opportunity to discuss this subject with you at that time."[26]

Following the hearing, Affleck, President of Universal Atlas, wrote to the Washington Committee with reference to opposition by the Consumers Advisory Board of the NRA to the selling at delivered prices, and suggested submission to that Board of copies of a statement which Young had made in support of the Code.[27] The letter follows:

"You will recall that among those who objected to the F.O.B. point of delivery system in the cement industry was George M. Tisdale, special representative of the Consumers' Advisory Board of the NRA. It is understood that an effort was made to contact

[26] Com. Ex. 836-2 V.

[27] Com. Ex. 836 T.

Mr. Tisdale but that he was not disposed to discuss this.

It would seem that since the Consumers' Advisory Board is an official part of the NRA set-up and that since it is presumed to have no selfish interest other than to protect the interests of consumers, the opinion of this board may have considerable weight with the administrator.

It is assumed also that the 12 copies of the various briefs that are submitted provide only one copy for any particular division of the NRA. Accordingly there would be only one copy of the brief on the F.O.B. delivery point system for the entire membership of the Consumers' Board. For this reason it is suggested that immediate consideration be given to preparing sufficient copies of the several statements on this phase of the subject (as presented by Mr. Young), together with Mr. Young's statements on losses in the cement industry, so that individual copies can be made available immediately for each member of the Consumers' Advisory Board.

It is believed, if the board as a whole is disposed to be fair, that supplying each member of the board with a separate copy hopefully will enable the board to come to an opinion different from that cited by Mr. Tisdale.

Very truly yours,

B. F. Affleck,
President.

BAS U

Copy to Mr. J. S. Young (Allentown, Pa.) Air Mail
P. S. Since reading the above, it seems to me it would be well also to consider putting this material in printed form suitable for distribution in selected places such as Illinois newspapers, technical papers, dealer associations and other outfits. However, we should not wait for this printed matter before going ahead with the material for the members of the Consumers' Advisory Board."[28]

[28] Com. Ex. 836 T.

On September 22, 1933, Condon, General Manager of Hawkeye, wrote to Young requesting a copy of the latter's statement justifying the delivered price system as compared to a rigid F.O.B. mill price plan.[29]

2. Amendments

The amendments to the pricing provisions of the Code were preceded by meetings of the industry members and Institute Trustees in the summer of 1934, which were held under the instructions and guidance of the NRA.[1] The proposed revisions and amendments were brought to the attention of members of the industry[2] and considered by them.[3]

An industry meeting was held on July 10, 1934 for the purpose "primarily to consider what the Administration has in mind with reference to our Code."[4]

A public hearing was held by the NRA on July 11, 1934 and a statement was submitted by Conn, President of the Institute, on behalf of the industry.[5] The statement listed various articles of the Code which the Consumers' Advisory Board was seeking to delete or rewrite, including the rewriting of Article IX on pricing. The statement emphasized that the purpose of the NIRA was to promote recovery through self-regulation of the industries and that the changes sought by the Consumers' Board were opposed to that purpose. It said in part:

> "• • • The Act declares the policy of Congress which was, in part, 'to provide for the general welfare by promoting the organization of industry for

[29] Com. Ex. 836-2 B.

[1] Coogan, Vice President, Alpha (R) Tr. 24735-36, 24962.

[2] Bates, J. E., Sales Manager, Federal (R) Tr. 30753.

[3] Russell, Vice President, Peerless (R) Tr. 34320.

[4] Com. Ex. 598 B-C.

[5] Com. Ex. 598 G-K.

the purpose of cooperative action among trade groups.' If there is to be an end to voluntary codes there is an end too of any attempts to fulfill this purpose of cooperative action among trade groups.

This consideration is broader than the merits of any specific proposals. If the N.I.R.A. is to be effective in accomplishing any of its aims—and the Cement Industry is sincerely desirous of promoting all of them—the codes of fair competition must, we believe, reflect the bona fide efforts of industries to govern themselves. If a code represents a plan of real self-regulation it will in large part succeed in rehabilitating industry and in accomplishing those other policies of the Act; if, on the other hand, voluntary regulation is to be supplanted by imposed regulation, then we gravely doubt that the Act or the Codes will work.

When we insist that the N.R.A. codes must essentially constitute charters of self-regulation we, of course, do not mean that industry can write its own ticket to pursue a selfish purpose. The Act itself requires that certain provisions be written into codes and restricts the nature of the other provisions. Writing a code, we admit, is a process of give-and-take. But this process began when we presented our code a year ago. At that time some of the provisions that our industry wanted were given to us. But also at that time many of the proposals we made were denied us—at the instance of the N.R.A. Divisions and Advisory Boards, which now want to take away from us most of what remains of our voluntarily submitted proposals.

• • •

But let us revert to the 41 changes which the Administration now proposed to make in the cement code. Generally speaking we feel that these changes would strip our code of all value as an instrument of self-regulation. Some of these proposals do not fit the problems in our industry. If these changes are imposed upon us, we fear that they will so weaken our safeguards and increase our burdens that the code will become impotent.'"[6]

[6] Com. Ex. 598 H-J.

It said further concerning the purpose of open price filing:

> "• • • The whole purpose of the open price plan is to reveal all competitive facts that competition may be exerted openly, fairly, and intelligently."[7]

On June 8, 1934 a proposed amendment was submitted for consideration to the members by the Code Authority, which contained a provision for filing and meeting destination costs on sales to the United States Government computed on the basis of land grant railroad rates. This proposal was never made a part of the amended Code as the practice of filing destination costs was already being carried on based on the interpretation by the Code Authority that such destination costs were in fact prices.[8]

In addition to the changes in pricing provisions already noted the Code was amended further to provide for an agreement for liquidated damages in the event of violation of the Code. The amendment suggested a form of agreement for such damages in an unspecified percentage of the selling price on any sale in violation of the Code.[9] This provision was never operative during the Code period, damages were never assessed thereunder and the Code provision itself was incomplete.[10]

C. Operation of Open Price Filing Under the Code.

1. Self Government Under the NIRA; Function of Code Authority

NRA Bulletin No. 7, entitled "Manual For The Adjustment Of Complaints By State Directors And Code Authori-

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[7] Com. Ex. 598 J.

[8] Com. Ex. 1021 A, D; Reiter, Secretary, Code Authority (C) Tr. 4297. Evidence concerning destination costs to the Government during the Code period [illegible]ssed, *infra*, p. 658.

[9] Com. Ex. 560, pp. 12-13, 31.

[10] Reiter, *supra*, Tr. 3462-63.

ties" contains the following provisions which are important to consider in the discussion relative to open price filing and the procedure of the Code Authority:

"PART ONE—INTRODUCTION

It is the purpose of this Manual to indicate the method by which complaints of violations of NRA Codes of Fair Competition will be handled by NRA and by Code Authorities. This Introduction sets out the fundamental relationship between Industry and NRA in Code Administration with particular emphasis on that relationship as it bears on the problems of adjusting complaints of violations of NRA Codes.

I. CODE ADMINISTRATION

A. Industry Administers Codes Subject to the Ultimate Responsibility of NRA

After a Code has been approved, there remains the problem of Code administration. The responsibility for insuring that Codes are administered and that the public is protected lies with the Administrator; but the aim of NRA is to give to Industry, through its Code Authorities, the widest possible range of self-government, subject to the ultimate responsibility of the Administrator. Consequently, practically all Codes provide that the Code Authority thereof is to administer the Code.

B. Two Aspects to Code Administration—

(1) Planning and Progress;

(2) Compliance.

There are two aspects to Code Administration: (1) Planning and Progress and (2) Compliance. The first aspect includes such functions as economic planning and research for the Industry, reports and recommendations on conditions in the Industry, collection of statistical data, preparation of cost accounting methods, etc. The second aspect includes: (a) The instruction and education of those subject to the Code as to their responsibilities thereunder so as to anticipate and avoid complaints of non-com-

pliance. (b) The adjustment of complaints of non-compliance by education, findings of facts, and the pressure of opinion within the Industry. (c) The adjustment of complaints by conciliation, mediation and arbitration. (d) The rendition of reports to the enforcement agencies of government in those cases where all other means have failed. Such reports should be based upon adequate findings of fact.

C. Fundamental That Industry Should Effect Both

It is fundamental, within both the letter and intent of NIRA (the National Industrial Recovery Act), that as much as possible of both aspects of Code administration be effected by Industry itself. This should be done through the Code Authority (specifically provided for in the Code).

D. Equally Fundamental That NRA Will Supervise and Act Where Industry Does Not

It is equally fundamental, within both the letter and intent of NIRA, that the ultimate responsibility for efficient Code administration lies with NRA, which will supervise Code administration by Code Authorities. To carry out this responsibility most Codes provide for one or more Administration Members to sit on the Code Authority without vote, but with a veto on all acts of the Code Authority in Code administration (subject to review by NRA). In addition, NRA will directly administer the Code itself wherever an Industry is unable to administer it or fails to administer it, or where there are certain functions of Code administration which by their nature government should perform directly.

E. Industry Organized Through Trade Associations for 'Planning and Progress'

In an Industry sufficiently organized to have agreed upon a Code of Fair Competition, there usually will be no need for Government administration in the 'planning and progress' field. These

> functions Industry is already performing for itself through its trade associations. A trade association may be a Code Authority, or may be used by a Code Authority, as provided in the Code. It is the policy of NRA to build up and strengthen trade associations throughout all Commerce and Industry so that they may perform all Code administrative functions. A Trade Association Division has been established in NRA to carry out this policy and to advise and assist Industry in the performance of these functions."[1]

The manual also contains detailed provisions for the "Adjustment By Code Authorities Of Complaints of NRA Code Violations". [Resp. Ex. 182; at page 23 *et seq.*]

2. Purpose of Open Price Filing and Notices for Filing of All Prices

The requirements of Article IX of the Code for filing and publication of cement prices constituted an "Open Price Plan",[1] whereby competitors knew one another's prices, thus making it possible for all to bid on a parity.[2] It was felt that open price filing under the Code prevented secret rebates, concessions and discriminations between customers.[3]

On December 8, 1933, the day after the Code became effective, the Code Authority gave the following written notice to all members of the industry to file their prices:

> "Your attention is directed to Article Nine, Section One of Cement Code which requires that all members of industry shall file by December Twelfth with Code Authority its prices and all terms and conditions of sale for its regular and modified portland cements. Your price list so filed should include

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[1] Resp. Ex. 182.

[1] Reiter, Chairman, Cement Code Authority (C) Tr. 16982.

[2] Com. Ex. 277 K-M: Letter from Reiter to Professor Burns.

[3] Coogan, Vice President, Alpha (R) Tr. 23937-38.

your prices to every point of delivery which you normally quote and should be sent promptly to the Code Authority care Cement Institute, Conway Building, Chicago, Illinois.'"[4]

In addition to the above notice, the Code Authority notified the industry in various general and special letters and interpretations that f.o.b. mill as well as delivered [destination] prices should be filed.[5] Specific reference to the filing of f.o.b. mill prices is contained in the Code Authority's letter of May 26, 1934.[6]

At the outset there were approximately 300,000 prices filed for some 60,000 destinations with new filings continually being made.[7] By April 11, 1935 the number had increased to over 350,000.[8]

The Code Authority established a card index system in which all prices for a given destination were shown on a single card. It took several months to complete this index.[9]

3. Requirement of Definiteness of Filing

In general the only conditions applied by the Code Authority for it to accept price filings were that they should be written, definite and understandable. By "definite" it was meant that the conditions affecting the price had to be fully stated so that other members of the industry could avail themselves of their privilege under the Code of meet-

[4] Com. Ex. 910 A.

[5] Reiter, Chairman, Cement Code Authority (C) Tr. 3813-15. Com. Ex. 716 C; and see *e.g.* Interpretations Nos. 21, 32, 32 A and 33 of December 1933 and January 1934 [Com. Ex. 979 A-D]; also General Letter dated March 2, 1934 [Com. Ex. 716 B].

[6] Com. Ex. 840 I.

[7] Nelson, J. L., Vice President, Wolverine (R) Tr. 35923-24.

[8] Com. Ex. 277 K-M: Letter of Reiter to Professor Burns.

[9] Nelson, *supra*, Tr. 35924; Com. Ex. 911 A-V.

ing prices filed by competitors.[1] Thus the filing of a mere dollar amount was insufficient. The Code Authority had to know the unit, the type of cement and package and the cash discounts.[2]

More specific requirements were stated in a General Letter of the Code Authority of June 19, 1934[3] concerning the method of filing prices and Government destination costs in order to facilitate filing and handling of inquiries. These called for such matters as the name of the town, the kind of package, the date of the letting and whether the filing was applicable to such letting only, any special conditions which applied; any special provisions governing delivery such as the addition of switching charges, details on delivery by truck, barge or vessel and corrections, changes, additions or withdrawals relative to prices already filed. Illustrations of details called for on prices for delivery by truck are set forth in the footnote.[4]

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[1] Reiter, Chairman, Cement Code Authority (C) Tr. 16982-86, 16995-97, 17099.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35924-26.

[2] Reiter, *supra*, Tr. 16997-99.

[3] Resp. Ex. 2430 A-B.

[4] (d) Territory to which trucking conditions applied (Reiter, *supra* (C) Tr. 4158-62);

(e) minimum quantities (trucking) (Resp. Ex. 2143: Federal to Code Authority, letter dated 3/4/35);

(f) whether loaded trailer was to be left on job (Resp. Ex. 2143, *supra;* Resp. Ex. 2636 U: Letter dated 11/28/34, Code Authority to Members);

(g) who was to unload trucks (Resp. Ex. 2142 A: Reiter to Bates, letter dated 2/27/35);

(h) delivery to warehouse or to job site (Resp. Ex. 2142 A, *supra*).

If these filing requirements were not complied with, the filer was so advised and asked to clarify the filing.[5] If the rejection of the filing was challenged, it was referred to the full membership of the Code Authority whose determination was followed.[6]

4. No Restrictions as to Type of Price

Reiter, Secretary and later Chairman of the Code Authority, testified that the Code, as approved, "contained no restrictions at all" as to whether a producer could file at delivered prices or f.o.b. mill.[1]

He testified further that "The Code Authority neither dictated or attempted to dictate what prices were to be filed,"[2] and that it did not try to restrict any filing either of a destination or a mill price, provided it was definite.[3]

Murray, Deputy NRA Administrator, testified that under the Code the companies were "permitted to sell in any manner in which they chose * * * Delivered at the mill or at destination or point of sale or halfway between. It limited them in no way."[4]

Executives of numerous companies all testified substantially to the effect that the Code Authority had never attempted to control the prices filed by their companies or the kind of prices that might be filed or the terms and conditions of sale, as follows:

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[5] Nelson, J. L., Vice President, Wolverine (R) Tr. 35926. Reiter, Chairman, Cement Code Authority (C) Tr. 4158.

[6] Reiter, *supra*, Tr. 4170; Com. Ex. 278 A-F: Correspondence between Reiter and members of Code Authority.

[1] (C) Tr. 16981.

[2] (C) Tr. 16921; see also Tr. 17003.

[3] (C) Tr. 16982-86, 17099.

[4] (C) Tr. 86.

Green Bag, W. Va.: Wood, General Manager (R) Tr. 29543.
Hawkeye: Manley, General Manager (R) Tr. 41673.
Keystone: Scott, H. M., President (R) Tr. 27557.
Lone Star: Koch, Vice President (R) Tr. 33232-34.
Medusa: Dawson, Vice President (R) Tr. 40061.
Missouri: Alexander, President (R) Tr. 37221.
National: Dannelly, Vice President (R) Tr. 39707-12.
Nebraska: Hoenig, Sales Manager (R) Tr. 42023.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36503-04.
Oklahoma & Arkansas: Thompson, Sales Manager (R) Tr. 46500-01.
Volunteer: Roberts, Traffic Manager (R) Tr. 31744; Com. Ex. 978 F.
West Penn: McKee, Vice President (R) Tr. 27852.
Whitehall: Elliott, Vice President (R) Tr. 28596.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35926.

Coogan, Vice President of Alpha, testified that the company could file "any prices that we saw fit to make".[5] He said further that the Code Authority did not attempt to control such prices "in any way", rather, "it was up to the filer himself to decide what price he wanted to file".[6] Reiter testified to the same effect.[7]

5. No Restriction as to Changes in Filed Prices

The absence of restrictions applied as well to changes in filed prices whether they were increases or decreases so long as the change was filed in accordance with the Code. There was testimony by executives of various respondent and non-respondent companies that they were free to make

[5] (R) Tr. 24202.

[6] (R) Tr. 23935-36.

[7] (C) Tr. 3053.

such changes and were in no way bound to follow the filed prices of their competitors.[1]

Typical of this evidence is the testimony of Coogan, Vice President of Alpha, that "there was no obligation on the part of anybody to quote that same price. If they felt like quoting a higher price, they could do it; if they felt like quoting a lower price, they could file a lower price and quote it".[2]

Hartley, Sales Manager of the non-respondent, South Dakota, testified as follows:

> "Q. Now, you told us a moment ago you were perfectly free to raise your price if you wanted to. Did you feel free at the time during the Code that you would change any of the price filings whenever you chose to do so, if you filed your price first? A. Yes, sir; we could change our price; either reduce or advance, under the rules set down by the Code Authority."[3]

There were some cases where the filer of a low price increased it to a higher price filed by competitors.[4]

6. Types of Prices Filed

"Price" was considered to be the amount paid by the buyer, "a figure at which goods changed hands".[1]

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[1] Dannelly, Vice President, National (R) Tr. 39651-52.
Moore, R. W., Vice President, Dewey (R) Tr. 47020-23.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 29543.
Elliott, Vice President, Whitehall (R) Tr. 28596.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46500-01.
Coogan, Vice President, Alpha (R) Tr. 23937-38.

[2] (R) Tr. 23937-38.

[3] (R) Tr. 41477.

[4] Reiter, Chairman, Cement Code Authority (R) Tr. 38225-29.

[1] Reiter, *supra*, Tr. 3816-17, 17001-02.

Prices were accepted for filing regardless of how they were arrived at.[2]

a. F.O.B. Destination

The bulk of the prices filed were of this class and were filed by each manufacturer. Prices for all destinations throughout the country were included, whether they were for points at which cement was being consumed or not.[1] Reiter, knowing that this was generally the customary method of quoting, advised members of the industry that the Code Authority was equipping itself to handle this mass of destination prices.[2] These prices covered "all types of delivery, such as rail, truck, boat and barge".[3] Reiter testified that they were figured from certain basing points and that their identity at given destinations presupposed they were figured from some common points.[4]

The prices so filed were the current market quotations of the filers and the same as those of their competitors which the filers had picked up in the field and listed in their individual company records. Copies of tabulations from these records were forwarded to the Code Authority.[5]

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[2] Nelson, J. L., Vice President, Wolverine (R) Tr. 35926.
Reiter, Chairman, Cement Code Authority (C) Tr. 2804-05, 16981, 17001-02.

[1] Nelson, *supra*, Tr. 35924-26.

[2] Reiter, *supra*, Tr. 3811-17.

[3] Nelson, *supra*, Tr. 35924-26.

[4] (C) Tr. 3447.

[5] Moore, R. W., Vice President, Dewey (R) Tr. 46921-22.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46500-01.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36503-04.
Hartley, Sales Manager, South Dakota (R) Tr. 41475-77, 41479.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 29543.
Com. Ex. 408-09.

b. F.O.B. Mill

There were a considerable number of f.o.b. mill prices filed at more than 25 mills. This number was exclusive of filings f.o.b. packing plants such as those of Huron at Milwaukee and of Universal Atlas at Buffington, Indiana. Nor did the number take into account mill prices which were to be included in destination costs to the United States Government "with the Control Clause out".[1]

The witness Reiter so testified and enumerated from memory the names of various mills. These included Dewey [at Lynwood, Iowa], Huron [at Duluth], Kosmos, Lone Star [at New Orleans], Marquette [at Cape Girardeau], South Dakota, Southwestern [at El Paso], Universal Atlas, all mills of the Ideal Company and its various subsidiaries, all mills in the states of Michigan and California, certain mills in Colorado and three mills in Oregon.[2]

These mills did not invariably file f.o.b. mill prices and all of them also filed destination prices.[3]

The same witness testified that some of the f.o.b. mill filings were not restricted in any way. Most of them were restricted "so as not to include rail delivery" or to f.o.b. barge, f.o.b. truck, f.o.b. mill for sale to the Federal Government or f.o.b. mill for a specific Government letting.[4]

Frequently the f.o.b. mill prices were the equivalent of the basing point prices of the filers.[5] The witness could not recall any case of a non-basing point mill which filed a mill price either with or without restriction excepting several mills in Michigan such as Petoskey, Aetna's Port

[1] For evidence relative to the Control Clause, see Part IV D, *infra*, p. 817 *et seq.*

[2] Reiter, Chairman, Cement Code Authority (C) Tr. 17000-05, 17099-110. See also Tr. 3708-10, 3817-18.

[3] Reiter, *supra*, Tr. 17108.

[4] Reiter, *supra*, Tr. 17104-09.

[5] Reiter, *supra*, Tr. 17110, 3817-18.

Huron and Fenton mills and Consolidated's Cement City mill.[6]

The Code Authority never interfered with f.o.b. mill filing or notified members of the industry that they should not file such prices.[7] Reiter testified that the term "price" covered an f.o.b. mill figure, including one at a basing point mill.[8] He did not remember if the Code Authority was ever requested to rule whether or not the Federal Government could be quoted on the basis of f.o.b. mill and said that if there had been such a request the Code Authority would have replied, as it did later, that it was entirely proper under the Code.[9]

In his letter to Kantor of the NRA Research & Planning Division, dated January 19, 1935, Reiter, then Chairman of the Code Authority, stated that the Code did not prevent f.o.b. mill filing and that the Code Authority had so advised the industry, but that it did not affect the great preponderance of destination price filings.[10] Subsequently, in September, 1935, Brooke, then Sales Manager of Monarch, wrote to Reiter relative to a letting by the Reclamation Bureau which requested bids f.o.b. shipping point. He asked Reiter whether or not f.o.b. mill bids were contrary to customary trade practices and said that such bids looked like "an excellent way to eliminate competition".[11]

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[6] Reiter, Chairman, Cement Code Authority (C) Tr. 17110, 17145-47. This testimony did not relate to the western part of the country as the witness was unfamiliar with basing points there.

[7] Dannelly, Vice President, National (R) Tr. 39795.
Reiter, *supra*, Tr. 3811-17.

[8] (C) Tr. 3811-17.

[9] (C) Tr. 3836-38.

[10] Com. Ex. 277 D-E.

[11] Com. Ex. 279 A.

Reiter replied in the negative and said "Whatever we may think * * * of filing and bidding a price f.o.b. mill", the Code had never prevented it. In the same letter Reiter said that there were not many f.o.b. prices filed.[12] Similarly, he testified that such filings were comparatively few in number and "exceptional", but that they were not contrary to customary trade practices.[13]

Brooke, Vice President of Monarch, was examined by Commission's counsel concerning his statement that f.o.b. mill bids looked like "an excellent way to eliminate competition" and was asked to explain why he believed that would occur. He testified as follows:

> "A. Well, if I remember correctly, that referred to some Bureau of Reclamation invitations from the Denver office in which they did not give the destination, and without those destinations mills as far removed as we were naturally would not attempt to bid any mill price; so my thought was that the Government was not getting all the competitive bids that they otherwise would have if those mill prices had not been filed.
>
> Q. F.o.b. mill bidding, you think, eliminates a number of bidders? A. Yes, I thought that was detrimental to the Government's interests.
>
> Q. What is that? A. I think that is detrimental to the Government's interests.
>
> Q. And do you think, as I understand it, that bidding destination prices is competitive? A. If we know the destination we are in better position to estimate what our competition is likely to be, and I firmly believe that our bid would be lower than—that is, the cost to the Government would be lower than if we stuck to a strictly f.o.b. mill price.

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[12] Com. Ex. 279 B.

[13] Reiter, Chairman, Cement Code Authority (C) Tr. 3811-17, 3143-44, 3053.

> Q. Why do you think that there would be less bidders if you bid f.o.b. mill? A. As I said, not knowing the destination, we would not know how to estimate the competition that they would have to meet at destination, not knowing the destination." (Tr. 42409-10)

The record contains some instances showing that manufacturers misunderstood the contents of the Code and the attitude of the Code Authority concerning f.o.b. mill prices and bids on Government lettings. Thus, Rothbard, Attorney in the Reclamation Bureau, testified that in response to a letter which he wrote to Monolith-Midwest, Colorado and South Dakota, seeking an explanation of the identity of destination price bids, the manufacturers contended they were obliged by the Code to bid f.o.b. destination only. Rothbard took this up with the NRA and learned there that the Code did not so require.[14]

On another occasion, National wrote to the Code Authority in response to a complaint that it violated the Code in its bid to TVA of April 23, 1934. National said in part that its President had been advised in a telephone conversation with the Secretary of the Code Authority that that body "did not desire f.o.b. mill prices filed on Government lettings".[15] The Chairman of the Code Authority replied on May 25, 1935, and said in part:

> "Mr. Reiter does not clearly remember his telephone conversation with you of March 31 but states that upon such inquiries he has advised members of this Industry that it is unnecessary to file a price f.o.b. mill in addition to a Government destination cost but that price f.o.b. mill should not be bid unless properly filed with the Code Authority."[16]

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[14] (C) Tr. 1126-43; Com. Ex. 103.

[15] Com. Ex. 558 A-B.

[16] Com. Ex. 558 C.

The Code Authority disagreed with the position taken by some manufacturers that it was proper for them to bid unfiled f.o.b. mill prices derived from their filed government destination cost prices.[17] Reiter testified that the bidding of an unfiled f.o.b. mill price would still have been unsatisfactory to the Code Authority even if the bidder was bidding f.o.b. its own mill instead of from a basing point because the Code Authority was concerned with the actual filed prices.[18] The minutes of the meeting of the Institute Trustees of February 14, 1935, at which the Chairman and three other members of the Code Authority also were present, show that it was the opinion of those members of the Code Authority that quoting f.o.b. mill prices was not a violation of the Code if such prices were filed.[19]

In his letter to Professor Burns of April 11, 1935, the Chairman of the Code Authority discussed the nature and extent of f.o.b. mill filings as follows:

> "Truck prices may be filed with the Code Authority either f.o.b. truck at Member's mill or warehouse or f.o.b. destination, and both types are filed with us. Considerable areas in the United States are covered with us by truck filing. I should say that it was infrequent where prices are filed with us f.o.b. customer's truck at Member's mill or warehouse to restrict the territory to which deliveries may be made. I should likewise say that in general where truck prices are filed f.o.b. trucks at destination that such prices f.o.b. dealer's warehouse or job site are usually the same as the carload price f.o.b. that destination.

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[17] (C) Tr. 3702-04.

[18] Reiter, Chairman, Cement Code Auth. (C) Tr. 3708-09.

[19] Com. Ex. 622.

We have filed with us a number of prices in the United States f.o.b. barge or unloaded on dock at various destinations upon inland waterways and at coastal points. In general I would say that such prices f.o.b. barge reflect the carload price at such destinations, but in other cases they do not do so. I have in mind a number of west coast filings unloaded on dock which reflect special freight rates for transportation by vessel which were materially lower than the carload price filed for that same destination. We have filed with us to the best of my knowledge only three barge prices being f.o.b. destination. You understand, of course, that the open price provisions of our Code apply to possessions of the United States and all such prices naturally reflect the cost of water transportation.[20]

* * * *

As partially indicated above, we have filed with us a few prices f.o.b. barge, f.o.b. car, and/or f.o.b. trucks, mill. In some cases such prices are restricted for sale to the United States Government only, to railroads serving that mill or to some specific project or territory in which a specific project lies upon which bids are to be taken."[21]

c. Basing Point Prices

Reiter testified that such prices were filed occasionally.[1] He could recall only one instance where a manufacturer (Huron) sent in a number of base prices and said it was filing destination prices based on those figures but not filing them as f.o.b. mill prices. The Code Authority refused to accept these for filing because the basing point figure, unlike an f.o.b. mill figure, is not a price at which goods changed hands, and it would have placed the burden of computing the destination prices upon the Code Authority.[2]

[20] Com. Ex. 277 L.

[21] Com. Ex. 277 M.

[1] Reiter, Chairman, Cement Code Authority (C) Tr. 3447-48.

[2] Id., Tr. 3811-17.

d. Destination Costs to Government and Land Grant Rates

A Government destination cost at a given destination was explained by Reiter of the Code Authority as the lowest sum of any base price plus the applicable lowest freight rate available to the Government whether land grant, special or commercial rate.[1] Government destination costs ordinarily include land grant rates.[2] During the Code period the prevailing practice was to file Government destination costs with a "control clause" relative to the deduction of the lowest land grant, special or commercial.[3]

By interpretation of the Code Authority Government destination costs were treated and filed like any other price and Reiter testified that in his opinion they amounted to f.o.b. mill prices.[4]

In occasional instances there were filed for particular lettings the land grant rates themselves upon which the Government destination costs were computed. When this occurred, they were received by the Code Authority as gratuitous information of which it took no cognizance.[5]

7. Denials of Agreement as to Filed Prices

The following is typical of the evidence to the above effect:

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[1] Reiter, Chairman, Cement Code Authority (C) Tr. 3748-49; Com. Ex. 841-2 J.

[2] Id., Tr. 3693.

[3] Com. Ex. 95 B.

[4] Reiter, *supra*, Tr. 3145, 3336-48, 4297.
The filing of destination costs to the Government, involving land grant rates and use of the control clause together with the action of the Code Authority thereon is treated fully under Part IV D, *infra*, pp. 817-39.

[5] Reiter, *supra*, Tr. 3494, 3692-93.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39085-86.

Wood, General Manager of Green Bag, W. Va. testified: "We filed our regular prices without agreements to (sic) anybody."[1]

Hartley, Sales Manager of the non-respondent South Dakota, attended a meeting with competitors during the Code period but never heard them agreeing to quote in any particular way.[2]

Pearson, Secretary and Treasurer of Cumberland, testified that his company never had an agreement with any other manufacturer regarding prices or the method of their determination except that it was required by law to observe filed prices under the Code. Apart from open price filing Cumberland never knew in advance what prices competitors were going to quote.[3]

There was testimony by executives of various companies that they did not agree on prices for particular government lettings during the Code Period. Thus Lewis, Manager of Volunteer, testified that his company had no consultation with competitors in connection with the price bid on the TVA letting of March, 1934.[4]

Manley, General Manager of Hawkeye, testified that his company never had any agreement regarding what prices it would quote to the government.[5]

McKee, Vice President of West Penn, testified that his company had not contact with its competitors as to the price it would file on the Tygart River Dam letting.[6]

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[1] (R) Tr. 29543.

[2] (R) Tr. 41475-77, 41479.

[3] (R) Tr. 39851-59.

[4] (R) Tr. 31656-57.

[5] (R) Tr. 41773-74.

[6] (R) Tr. 27818.

8. The Correction of Errors in Filings

During the early stages of the Code price filing the Code Authority from time to time gave notice of variations in filed prices to companies which did not file a price the same as the prevailing price filed for a given destination. This procedure was continued until the Code Authority was satisfied that the prices filed correctly reflected the desire of the filers.[1]

Such notice was given regardless of whether the prevailing price was higher or lower.[2] The Code Authority did not take up the matter with the filer of a low price any more than with a company which was high. The fact that a company sometimes filed a price which was lower than another company had filed did not constitute in itself reason for the Code Authority to think there was an error but where there was a single exception or a minority which filed higher or lower than the prevailing price, the Code Authority, in order to save work, would not notify the majority until it had been found out from the minority whether they wanted their prices to stand.[3]

There were several reasons for such notification of variations. The first was in order to check errors by some 30 inexperienced clerks in posting the enormous number of price quotations with which the Code Authority was swamped. The filing provision became effective on December 12, 1933 but it took several months to complete the postings.[4] Another reason was that the officials of the Code Authority, from their long experience in the business, knew that cement as a standard commodity could not be sold successfully above the lowest price and that prices

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[1] Reiter, Chairman, Cement Code Authority (C) Tr. 16999.

[2] Nelson, J. L., Vice President, Wolverine (R) Tr. 35924-26.

[3] Reiter, *supra*, Tr. 3831-37, 17097-98.

[4] Reiter, *supra*, Tr. 3821-29.
Nelson, J. L., *supra*, Tr. 35924-26.

tended to be identical at a given point. This caused them to doubt the accuracy of variations from a prevailing price.[5] Finally the Code gave all manufacturers the right to meet their competitors filed prices and the only way the filers could know of differences in price was by notification through the Code Authority.[6]

The notification was not for the purpose of dictating in any manner what prices an individual producer should file but to inform the filers how other prices conformed with theirs and thus give them an opportunity to correct them, if such records were in error.[7]

There were a number of instances where producers replied to these notifications that they intended the figures which they had filed and did not change them. In other instances they replied that they did not intend the price in question or increased a low price to the higher price filed by others.[8]

Examples of such notifications by the Code Authority and responses thereto include the following:

> Advice dated January 8, 1934 to Southern States that their price to Cave Spring was 4¢ lower than the price filed by competitors. Southern States replied that its filing was a typographical error.[9]
>
> Advice dated February 9, 1934 to Ash Grove that the prevailing price at Galloway, Nebraska was $2.63, 2¢ lower than Ash Grove had filed. Ash Grove replied that the prevailing figure was erroneous and

[5] Reiter, Chairman, Cement Code Authority (C) Tr. 3832.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35924-26.

[6] Reiter, *supra*, Tr. 3832.

[7] Nelson, J. L., *supra*, Tr. 35925.
Reiter, *supra*, Tr. 17097-98.

[8] Nelson, *supra*, Tr. 35924-26.
Reiter, *supra*, Tr. 3821-29.

[9] Com. Ex. 911 A-B.

explained that its own price was figured from the base price of Marquette plus a 17¢ freight rate.[10]

Advice dated March 30, 1934 to Lone Star that the lowest filed price filed for a destination in Louisiana was 2¢ lower than it had filed. Lone Star replied that the lower price was wrong. It explained the base price plus freight used in computing its own figure and asked the Code Authority to do whatever was necessary to clarify the matter.[11] On another occasion on April 25, 1934 Lone Star explained how it had computed its filed price for a destination in Virginia where the Code Authority had advised it of a higher prevailing price. Lone Star could not reconcile the higher price and inquired how it was computed. The Code Authority replied that it was due to a change in freight rate from Ironton, Ohio.[12]

Advice dated March 30, 1934 to Nebraska of a 2¢ lower prevailing destination price to which Nebraska replied by giving the base price plus freight and said that the prevailing price was too low and possibly some other company made an error in filing.[13]

Inquiry dated May 8, 1934 made of Oklahoma whether a revision which it filed to its Texas price list was a change in price where the prevailing price filed was 6¢ higher. Oklahoma replied that its lower price filing should be disregarded.[14]

Medusa on June 4, 1934 corrected a filed price to meet a 2¢ higher prevailing figure.[15]

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[10] Com. Ex. 911 C.

[11] Com. Ex. 911 E.

[12] Com. Ex. 911 G, H.

[13] Com. Ex. 911 F.

[14] Com. Ex. 911 M, N, O.

[15] Com. Ex. 911 Q, R, S.

National and Georgia on June 1, 1934 informed the Code Authority that while they had been following prices which they had filed for two destinations in Louisiana, they had been unable to verify them and now understood that they were "out of line". Accordingly, they requested correction.[16]

On June 4, 1934 Volunteer, in filing a price, inquired of the Code Authority whether the price was correct and the Code Authority replied that prices filed at the same figure were effective immediately.[17] Roberts, Traffic Manager of Volunteer, testified that by "correct" he meant "whether that was the lowest price on file or not".[18] On another occasion on February 15, 1934 Standard gave its own filed price and a lower quotation by Lehigh and inquired whether it was wrong.[19]

Reiter of the Code Authority testified in explanation of the Authority's replies to these queries of the Standard and Volunteer as follows:

"Q. • • • How could you go about telling Standard whether or not it was wrong?

• • •

A. But I think it would be self-evident to this inquiry that they were wrong if they bid higher than the lowest filed price filed with the Code Authority, providing that they had notice of it.

Now, if they had inquired from us, we would have advised them of the lowest price filed. And then they were wrong, if they wanted the business and did not meet this lowest filed price, because they could not get any at a higher price.

Q. But what reason was there to believe that the higher price was any more wrong than the lower price? A. Because it don't get the business.

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[16] Com. Ex. 911 T, U.

[17] Com. Ex. 978 F-G.

[18] (R) Tr. 31744.

[19] Com. Ex. 978 A.

Q. Even if it were of a better quality of cement? A. Mr. Wooden, even with these variations in quality of standard cement, in my opinion you can't get one cent more a barrel for it, the variations being as slight as they are.

* * *

Q. I notice in Exhibit 978-F the Volunteer Company wanted to know whether a price which it was filing of $2.50 at Athens, Alabama, was correct or not. How could you answer a question like that, whether it was correct? A. I am sure that we interpreted that letter when received to mean whether it was the lowest price filed, or equal to the lowest price filed, and on that basis I am sure we answered.

Q. That the price was correct? A. No; we gave them information as to the lowest price filed, and if there was a variation in the price under in that case we probably gave them that information also.

Q. In that case, however, they filed the correct price and then wanted to know if it was correct, I believe? A. I think I recollect that."[20]

References in the record to other corrections in filed prices are footnoted.[21]

D. Executive Order 6767 Permitting Sales Below Filed Prices Where Federal Funds Involved

On June 29, 1934 Executive Order 6646 which required a certificate of Code Compliance was amended by Executive Order 6767 so as to permit bids on projects involving the use of Federal funds at a price not more than 15% below that filed by the bidder pursuant to an approved code. The order, among other things, provided that such lower price, if bid, should be filed with the Code Authority after the opening of bids on the letting, and that the NRA

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[20] (C) Tr. 3892-94.

[21] Com. Ex. 911 D, I, J, K, L, P and V, dated respectively: April 5, 27 and 30, 1934, May 1 and 4, 1934, and June 9, 1934.

Administrator might reduce the tolerance from 15% to not less than 5% if he should find it necessary to prevent destructive price cutting. The provisions of the order are footnoted.[1]

[1] Com. Ex. 179

"EXECUTIVE ORDER

MODIFICATION OF EXECUTIVE ORDER NO. 6646 OF MARCH 14, 1934, ETC.

By virtue of and pursuant to the authority vested in me under title I of the National Industrial Recovery Act of June 16, 1933 (ch. 90, 48 Stat. 195), and in order to effectuate the purposes of said title, it is hereby ordered as follows:

1. Any person submitting a bid to any agency or instrumentality of the United States, or any State, municipal, or other public authority, to furnish goods or services at prices which, in accordance with the requirements of one or more approved codes of fair competition, must have been filed, prior to their quotation, with the Code Authority, or other designated agency, shall be held to have complied adequately with the requirements of such code of fair competition: (a) If said bidder shall quote a price or prices not more than 15 percent below his price or prices filed in accordance with the requirements of such code or codes; and (b), if, after the bids are opened, each bidder quoting a price or prices below his filed price or prices shall immediately file a copy of his bid with the Code Authority or other appropriate agency with which he is required to file prices.

2. If upon complaint made to the Administrator for Industrial Recovery, he shall find, after due investigation, that the tolerance of 15 percent provided in this order is resulting in destructive price cutting in a particular trade or industry, he is hereby authorized to issue an administrative order reducing said tolerance of 15 percent for such trade or industry to the extent he shall find necessary to prevent such destructive price cutting, but in no event to a tolerance of less than 5 percent.

3. The Administrator for Industrial Recovery is directed to cause a study to be made of the effects of this order upon the maintenance of standards of fair competition in sales to public

Reiter, Secretary of the Code Authority at the time Executive Order 6767 was issued, testified that the Authority recognized the letter of the provisions of the Order and obeyed it strictly,[2] although he testified, as follows, that it was a threat to the open price plan under the Code, would lead to destructive competition and encourage selling below cost:[3]

"Q. Wherein did the permission to quote as low as 15 percent below the filed prices on government business constitute a continuing threat of defeating the purpose of the open price plan, as you stated in your letter? A. My idea of the value to the industry of a plan of open price filing is that each member of the industry would have full knowledge of competitive prices and from there could use its own judgment as to what it wanted to file and quote. Of course, under the application of the executive order, there considered, the competitors could not know what—I mean any manufacturer could not know what any competitor might be willing to quote on any government job.

Now, then, these government jobs required considerable amounts of cement. A progressive reduction of 15 percent, in the filed price from one job to another would certainly, in my opinion, become finally destructive competition and encourage selling below cost.

Q. That was a maximum of 15 percent, was it not? A. That was a maximum.

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and private customers and to report to the President thereon within six (6) months of the date of this order.

4. All prior Executive orders, including Executive Order No. 6646 of March 14, 1934, are hereby modified insofar as, and to such extent, as they may be in conflict or inconsistent with this order.

FRANKLIN D. ROOSEVELT

The White House
June 29, 1934.

(No. 6767)"

[2] (C) Tr. 17050-53.

[3] (C) Tr. 3359-60.

Q. What was there to prevent someone making a reduction of 5 percent below the filed price and then filing a reduction? A. Under the provision of that executive order, anybody who bid to the government within 15 percent below their filed prices must necessarily immediately file it with the code authority; that is, I mean, after they had bid it. Now, then, the progressive reductions would go on from there.

Q. In other words, one might bid 5 percent, 7 percent, and 10 percent—— A. (Interposing) I mean on subsequent lettings.

Q. And even on succeeding lettings, one might make it 5, another 7, and others 3? A. Yes.

Q. So, if that were done, you would have all sorts of prices bid on government contracts? A. That is right.

Q. And is that what you thought threatened defeat of the purpose of the open price plan? A. No, I have described what I thought would defeat the purpose of the open price plan; namely, the progressive reduction in prices until the price of cement got below the cost of production, which has happened in this industry.

Q. Under the terms of the executive order, however, it would have been no violation of the code if members had bid prices up to 15 percent below their filed prices? A. That is right."

At an industry meeting held on July 10, 1934, after discussion of the Order, the following resolution of protest was adopted:

> "RESOLVED that, on behalf of the Cement Industry, a protest should be filed with NRA against the Executive Order of June 29th, which permits bids at 15% below posted prices and requests should be made to exempt this Industry from it."[4]

There were present at the meeting in person or by proxy representatives of some forty respondent companies and

[4] Com. Ex. 598 D.

three non-respondents.[5] An executive of one respondent who attended the meeting testified that it was the consensus of opinion that the Order was not liked.[6]

In a statement on behalf of the Cement Industry submitted at the NRA hearing of July 11, 1934 by Charles F. Conn, the following comment was made on the Order:

> "This last order affects all members of industries operating under open price plans—that is, fully half of all the industries operating under codes. The order invites members of these industries to bid 15% under the prices which they had posted. The whole purpose of the open price plan is to reveal all competitive facts that competition may be exerted openly, fairly, and intelligently. This order invites a return to primitive and unintelligent methods of competition.
>
> The uncertainty, misunderstanding, and confusion resulting from this order are bound to be followed by a series of interpretations. And this phenomenon leads to another serious consideration. No one can be expected to play the game when the referee continually changes the rules."[7]

Executives of several respondents testified that to their knowledge neither the Code Authority nor the Cement Institute took any position as to whether or not industry members should bid as permitted by the Order.[8] Likewise, there was testimony by various executives that they

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[5] Com. Ex. 598 B-C.

[6] Elliott, Vice President, Whitehall (R) Tr. 28672-73.

[7] Com. Ex. 598 I-J.

[8] Alexander, President, Missouri (R) Tr. 37278-79.
Brooke, Vice President, Monarch (R) Tr. 42260-62.
Moore, R. W., Vice President, Dewey (R) Tr. 46948-49.

did not agree with their competitors as to what action they would take in connection with the Order.[9]

Executives of various respondents testified that they did not take any action toward bidding below filed prices as permitted by the Order.[10] Among the reasons for their inaction were the following: Koch, Vice President of Lone Star, said that although he thought the Order relieved him of the obligation of maintaining filed prices on Government bidding, he "would not have called that an advantage" but "a loss".[11] Horner, President of Kosmos, testified "We did not think the Government was entitled to any better price than other purchasers".[12] Alexander, President of Missouri, stated that his company was losing money at the time and that it did not feel the Government was entitled to a preference.[13] Brooke, Vice President of Monarch, said that his com-

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[9] Alexander, President, Missouri (R) Tr. 37280.
Brooke, Vice President, Monarch (R) Tr. 42260-62.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39162-63.
Moore, R. W., Vice President, Dewey (R) Tr. 46948-49.
Manley, General Manager, Hawkeye (R) Tr. 41713.

[10] Elliott, Vice President, Whitehall (R) Tr. 28672-73.
Koch, Vice President, Lone Star (R) Tr. 33242.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36514-16.
Horner, President, Kosmos (R) Tr. 36948, 36814-15.
Alexander, *supra*, Tr. 37278-79.
Brooke, *supra*, Tr. 42260-62.
Blair, W. R., *supra*, Tr. 39162-63.
Warren, G. E., Vice President, Southwestern (R) Tr. 28956.
Moore, R. W., *supra*, Tr. 46938-41, 46944-46.

[11] (R) Tr. 33242.

[12] (R) Tr. 36948.

[13] (R) Tr. 37278-79.

pany did not quote below its filed prices to its regular customers because it did not want the business that bad and did not feel the Government was entitled to a special price. He continued, "We were somewhat amazed at this Order * * * we thought that it was out of tune with the provisions of the Code".[14] W. R. Blair, Sales Manager of Southwestern, testified that calls for bids at the time were very limited and his company felt there was no justification for such a discount[15] and also that Government business is no more attractive than commercial.[16] R. W. Moore, Vice President of Dewey, did not consider that the Government was entitled to a better price than its regular customers whose business and cooperation it had tried to develop and from whom it feared there would be a reaction.[17] He further took into consideration the increase which his company had effected in its labor scales pursuant to the President's request and the NRA Code and the corresponding increases in its cost of fuel, machinery and other supplies.[18] Manley, General Manager of Hawkeye, stated that he never felt that the Government was entitled to special price consideration.[19] (For other testimony by executives of respondents on the general subject of whether they considered the Federal Government entitled to special price consideration as compared with their commercial customers, see Part IV E, pp. 877-78, *infra*.)

As late as January 19, 1935, the Chairman of the Code Authority, in a letter to Kantor of the Research and Planning Division of the NRA, stated that so far as the Code

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[14] (R) Tr. 42260-61.

[15] (R) Tr. 39162-63.

[16] (R) Tr. 39006.

[17] (R) Tr. 46938-41.

[18] Moore, R. W., Vice President, Dewey (R) Tr. 46944-46.

[19] (R) Tr. 41713.

Authority knew, no Member of the Industry had "taken advantage of the permission granted by this Executive Order. * * * At least no Member of the Industry has notified this office" to that effect. The letter stated further than the Code Authority had never issued any instructions to the Members of Its Industry regarding Executive Order No. 6767, and continued:

> "* * * nevertheless this Order has been a matter of serious concern to the Industry. It constitutes a continuing threat of defeating the purpose of the open price plan and in the opinion of the Code Authority such Order is contrary to the fundamental idea of the open price plan which is to give every interested party exact knowledge of competitive conditions. As an indication that this expression constitutes the opinion of the Industry generally, 92% of its Members signed a protest and request for exemption for this Industry from the provisions of such Executive Order No. 6767."[20]

E. Publication and Meeting of Filed Prices; Identity of Prices Under the Code.

1. Publication

The Code Authority interpreted the provisions of the original Code for filing and publication together with those giving competitors the specific right to meet filed prices as authorizing it to pass on to competitors the filed prices since in order to meet filed prices manufacturers had to know them. Until the Amended Code of May 21, 1935 there was no specific provision for such dissemination. Reiter of the Code Authority testified that he considered the effect of both the original and amended Code to be the same and the same procedure was used by the Code Authority under both.[1]

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[20] Com. Ex. 277 D-E.

[1] Reiter, Chairman, Cement Code Authority (C) Tr. 3053-54, 3064-66, 16992.

All filed prices were open to public inspection. The practice of the Code Authority was to notify all producers who themselves had filed for a particular destination as to any changes or new filings by other producers for the same destination, and also to notify all those who made specific requests for filed prices regardless of whether the latter class had filed for the same destination.[2]

The Deputy NRA Administrator knew that the Code Authority was following this procedure and did nothing to interfere with or change it.[3]

Requests were received for information as to f.o.b. mill price filings and such prices were disseminated in exactly the same manner as f.o.b. destination prices.[4]

The practice of notifying interested mills of the lowest filed prices likewise was observed on approaching particular Government lettings.[5] Reiter testified that this was because a sale could only be made at the lowest price offered and producers could not meet the lowest filed prices if they were not informed of them.[6]

Non-respondent producers as well as respondents obtained information from the Code Authority concerning filed prices.[7]

Basing point prices occasionally were filed but were not considered to be prices (*supra*, p. 657) and were not circulated by the Code Authority.[8]

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[2] Reiter, Chairman, Cement Code Authority (C) Tr. 16987-88, 16994-95.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35924-26.

[3] Reiter, *supra*, Tr. 16993.

[4] Id., Tr. 3053, 3144-45; Com. Ex. 279 A.

[5] Id., Tr. 3692.

[6] Id., Tr. 3340-42, 3826.

[7] Hartley, Sales Manager, South Dakota State Cement Plant (R) Tr. 41475-79; Com. Exs. 408-409.

[8] Reiter, *supra*, Tr. 3447-48.

Destination costs to the Government were disseminated to each mill which might be interested.[9] They also were disseminated with f.o.b. mill prices when producers asked for such prices.[10]

Land grant rates which occasionally were filed were not circulated by the Code Authority except in so far as they were included in destination costs to the Government.[11] There was some testimony to the contrary by Coogan, Vice President of Alpha,[12] and Browder, Traffic Manager of Penn-Dixie.[13] In the latter case, however, it appeared that the witness had reference to the distribution of land grant information by the Cement Institute. Evidence with respect to this Institute service is covered under Part V J, *infra*, page 1132.

Occasionally when some particular destination was involved the Code Authority had to calculate the prices on file so that they could give the members complete information as to all filings.[14]

2. Meeting Filed Prices

Because of the specific right to meet filed prices under the Code, the Code Authority considered that when a seller who had not filed a price for a particular destination sold there at a price filed by a competitor he was "properly meeting the price filed by his competitor". If for example the same seller purported to meet competition not by delivery at the railroad station at the destina-

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[9] Reiter, Chairman, Cement Code Authority (C) Tr. 3691-92.

[10] Id., Tr. 3145 and see Part IV—relative to action of the Code Authority concerning the control clause.

[11] Id., Tr. 3494, 3732-34.

[12] (R) Tr. 24195-97.

[13] (R) Tr. 38503-04.

[14] Reiter, *supra*, Tr. 3375-76.

tion in question but by delivery by truck at the job site without filing his own price for such delivery, he was held to have violated the Code.[1]

Thus Reiter testified:

> "The requirement of the code was that he should file the price before it was used, unless he was meeting a price filed by a competitor.
>
> Trial Examiner Norwood: And if he failed to do that he violated the code, did he not?
>
> The Witness: That is right, your Honor."[2]

On January 31, 1934, less than two months after the Code became effective the Code Authority issued Interpretation 57 addressed to all members of the industry in which it stated that any company meeting a filed price should itself immediately file such price in order to enable the Code Authority to determine what companies were interested and should be advised of price changes at a given destination.[3]

The only price which could be quoted to the Government or to any other buyer was a filed price.[4]

On public lettings each bidder, as a result of dissemination by the Code Authority, knew the lowest price filed for that letting and had to meet that price or automatically was out.[5]

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[1] Reiter, Chairman, Cement Code Authority (C) Tr. 16988-89.

[2] (C) Tr. 16921.

[3] Resp. Ex. 2429.

[4] Colburn, Vice President, Marquette (R) Tr. 39979-80.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46500-01.
Scott, H. M., President, Keystone (R) Tr. 27557.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36503-04.
Elliott, Vice President, Whitehall (R) Tr. 28596.

[5] Reiter, Chairman, Cement Code Authority (C) Tr. 3691-92.
Manley, General Manager, Hawkeye (R) Tr. 41666-67.

3. Identity

It was generally true under the Code that there was a high degree of identity of delivered prices.[1] This was so because all prices were on file and competitors had the opportunity of knowing and meeting the lowest price at a particular destination.[2] The lowest filed price was used including the lowest destination cost to the Government.[3]

Colburn, Vice President of Marquette, testified that there were only 5 cases in which his company bid identical prices to the United States and all 5 occurred during open price filing.[4] Bidders had to meet the lowest filed prices in order to participate in Government lettings.[5]

Witnesses from Government departments called to the stand by the Commission conceded that it was "inevitable" that prices should be identical under the Code price filing.[6] Morgan, Chairman of TVA, testified that the Code "seemed to justify uniform bids. In fact we were getting them from many industries under the Code".[7]

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[1] Reiter, Chairman, Cement Code Authority (C) Tr. 3447-48.

[2] Coogan, Vice President, Alpha (R) Tr. 24200-01.

[3] Brooke, Vice President, Monarch (R) Tr. 42404-07.
Dawson, Vice President, Medusa (R) Tr. 40060-61.
Horner, President, Kosmos (R) Tr. 36815.
McGovern, Sales Manager, Hermitage (R) Tr. 36325-26.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37993-96.

[4] (R) Tr. 39042-45; Com. Exs. 165-166, 171, 193; Resp. Exs. 2992-95.

[5] Reiter, *supra*, Tr. 3691-92.

[6] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 200.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1238-40.

[7] (C) Tr. 2013-14.

F. Request of President Roosevelt to Code Authority to Encourage Submission of f.o.b. Mill Prices.

On May 8, 1934 Murray, Deputy NRA Administrator, communicated by telegram to the Chairman of the Code Authority the following:

[Italicised part quoted in Fdgs. Par. Seven (r)]

"I HAVE BEEN REQUESTED BY THE PRESIDENT OF THE UNITED STATES TO ENCOURAGE THE MANUFACTURERS OF CEMENT TO SUBMIT FOB MILL PRICES TO PROSPECTIVE PURCHASERS STOP I URGE THAT THIS QUESTION BE PLACED BEFORE THE CODE AUTHORITY FOR YOU INDUSTRY AND A REPORT OF THEIR ACTION THEREON PARTICULARLY AS IT AFFECTS PURCHASES BY STATE AND FEDERAL AGENCIES BE MADE TO THIS ADMINISTRATION WITHIN THE NEXT TWO WEEKS"[1]

Murray, Deputy Administrator, testified as follows concerning a complaint by Governor Horner of Illinois to Secretary Ickes about the asserted refusal by cement companies to sell cement to Illinois at mill prices and other matters which led to the above telegram:

> "Q. In the course of your contacts with the industry during the code did you have occasion to learn, or did you learn that the industry had a policy of selling on delivered prices? A. Yes, I found out that they did have that policy.
>
> Q. Will you state how the matter first came to your attention? A. Could you amend that question and say: how it came to my attention one time? I do not really know how it first came to my attention.
>
> Q. All right, the first time that you can recall. A. At one time the Governor of Illinois, Mr. Horner, wrote a letter to Mr. Ickes, Secretary of the Interior, complaining against the action of the cement companies in refusing to deliver cement to the State of Illinois at the mill, and the complaint of the Governor was relayed to me. That is one instance that I recall.

[1] Com. Ex. 6 A.

Q. What did you do with it? A. I telegraphed to the code authority and requested them to report to me what action, if any, they would take with respect to changing that policy.

• • •

Q. Now regarding this matter of Governor Horner's request for an f.o.b. mill price on the part of the industry, did you have any direct negotiations with the industry on that? A. Not with the industry.

Q. Or with the code authority? A. I discussed it with the chairman of the code authority, Mr. Rader.

• • •

Q. Was there any other government purchasing agency than the Interior Department that brought up this matter of the industry's delivered price policy? A. To me?

Q. Yes. A. Yes, the War Department objected to it and asked me what I could do about it, I believe.

Q. Is that about the same as these other requests? A. I believe it was before the request from the President.

Q. What steps did you take to carry out the requests of the War Department? A. I appointed Lieutenant Colonel Harris, who was the regular Army officer and in the Office of the Assistant Secretary of War, as my representative on the code authority for that industry.

Q. What was the outcome? A. Colonel Harris attended meetings of the code authority and was in a better positon than I to observe what the action was with respect to the invitations of the War Department to bid.

Q. As far as you know did the industry accede to the requests of the War Department regarding mill prices? A. I would not be prepared to answer that.

Q. You do not know? A. I do not know.

Q. Did the request of the Governor of Illinois for f.o.b. mill prices come direct to you or through some other channel? A. No, that request was made —it really was not a request to me by the Governor of Illinois. The Governor of Illinois wrote a letter to Mr. Ickes and in that letter he complained about

the actions of the cement companies with respect to f.o.b. mill, and Mr. Ickes brought the letter to the President, and on the top of the letter the President, apparently written in longhand, wrote 'F.D.R.,' apparently written to me and signed 'F.D.R.,' was to the effect that I should permit and encourage the industry to accede to the request of the Governor, or to get f.o.b.—I would much rather have the copy than depend on my memory.

Q. It was as the result of that that you sent that telegram? A. As the result of the President's notation on the letter sent to Mr. Ickes I sent the telegram to Mr. Rader.

Q. I notice you did not use the word 'permit' in your letter but merely 'encouraged.' A. Well, for the reason that I wrote to Mr. Marvin McIntire, secretary to the President, that the code did not place any restrictions on them and that the members of the industry were permitted, if they so wished, to bid in any way they wanted to and I had no authority to compel them. It seems to me the impression was in the mind of the Governor of Illinois that I had some authority over the industry. That was not the case. There was no authority under the National Industrial Recovery Act which would permit me, or any other official, to compel any action on the part of any member of the industry.

Q. When you say 'not compel' you mean not compel under the code, is that correct? A. Not compel adherence to the code.

Q. But the code itself did not compel selling in any one particular manner, f.o.b. mill or delivered? A. That is right.'"[2]

He testified further on cross-examination as follows:

"*By Mr. Leisure*:

Q. You understand, of course, when Governor Horner was talking about a delivered price that he was talking about purchases by governmental agencies, that is by the state? A. By the State of Illinois, that is my understanding.

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[2] (C) Tr. 76-77, 88-91.

Q. Now in your considerable experience in dealing with the cement code can you recall a single instance when a private individual complained about receiving delivered prices or purchasing at delivered prices? A. I do not recall any offhand."[3]

At a meeting of the Code Authority held on May 14-15, 1934, the Chairman read Murray's telegram of May 8, 1934. The minutes of the meeting show the following which then occurred:

"* * * A discussion ensued. It was the sense of the meeting that all members prepare a draft for a suggested reply and place these drafts in the hands of the Secretary for consideration later in the meeting.

* * * *

Upon reconvening at 4:30 P. M., May 15, various suggestions for reply to Mr. Murray's telegram quoted previously in these minutes were read. After considerable discussion a motion was made, seconded and unanimously carried that the following reply be sent:"[4]

The reply which the Code Authority determined to make to the Deputy NRA Administrator was forwarded by telegram by the Chairman on May 15, 1934 and read as follows:

[Italicized part quoted in Fdgs. Par. Seven (r)]

"THE CODE AUTHORITY OF THE CEMENT INDUSTRY ACKNOWLEDGES RECEIPT OF YOUR TELEGRAM TRANSMITTING TO US THE REQUEST OF THE PRESIDENT OF THE UNITED STATES THAT WE GIVE URGENT ATTENTION TO THE METHOD OF QUOTING PRICES ON THE PRODUCT OF OUR INDUSTRY STOP WE HAVE FOR A LONG PERIOD ENDEAVORED TO ARRIVE AT A METHOD WHICH AT ALL TIMES AND IN ALL MARKETS WOULD PROTECT THE USING PUBLIC AND PREVENT MONOPOLISTIC TENDENCIES STOP *WE EARNESTLY REQUEST YOUR COOPERATION TO PROCURE FOR A SMALL REPRESENTATION OF OUR INDUSTRY AN AUDIENCE TO PRESENT TO THE PRESIDENT OF THE UNITED STATES THE FACTS AS WE SEE THEM WHICH WE THINK JUSTIFY THE PRESENT METHOD*

[3] (C) Tr. 92.

[4] Com. Ex. 559 A-B.

OF SELLING AND QUOTING OUR PRODUCT STOP AWAITING THE FURTHER COMMANDS OF THE PRESIDENT IN THE PREMISES VERY RESPECTFULLY SUBMITTED."[5]

Murray, Deputy NRA Administrator, was examined by Commission's counsel as to whether any conference was arranged as suggested in the Code Authority's reply, and testified in the negative as follows:

> "Q. Was any conference arranged as suggested there? A. I arranged no conference between members of the industry and the President.
>
> Q. Did you arrange a conference between members of the industry and any official of the government other than in N.R.A.? A. No.
>
> Q. Did the industry make any subsequent efforts through you to arrange any such conference? A. I cannot recall whether they did or not. I do recall having a discussion with Mr. Rader about the possibility of the industry acceding to the President's request and Mr. Rader's statement of the position of the industry with respect to that practice was substantially the same as the statement made by Mr. Leisure in this morning's hearing. It did not seem to me that the industry wanted to abandon that practice and I did not feel that I should take the President's time to have them state the case to him when they did not seem inclined to want to abandon their stand."[6]

On May 17, 1934 John Treanor of the Riverside Cement Company, now deceased, wrote to Rader, then Chairman of the Code Authority, criticizing its reply to the Deputy NRA Administrator as "unyielding". He explained the different basis on which he would have handled the question raised by Murray's telegram such as by conceding f.o.b. mill prices on federal business in order to "approach the question in a large way; and * * * acquire some good-

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[5] Com. Ex. 6 B.

[6] (C) Tr. 85-86.

will in governmental quarters.'[7] This letter of Treanor is set forth in full under Part XVIII A, *infra*, pp. 2919-22.

On May 21, 1934 the Chairman of the Code Authority replied to Treanor's letter of May 17, 1934 as follows:

> "I have your letter of the 17th, and I am going to answer the last paragraph first by stating to you that your letter is not going to make me sore, but it makes me feel bad to think that any one man in our industry feels that he must give in immediately on any request from the Government without attempting to work the matter out in a way that would be beneficial to the entire Industry.
>
> The Code Authority members feel that they sent the proper kind of a telegram. It is not arbitrary, but it is not giving everything they ask for without a chance to explain it.
>
> In talking to Washington this morning, I find they were very well pleased with the telegram and stated they would arrange a meeting for me any time I called for it."[8]

Hogan, President of Lone Star, testified concerning the discussion which he had with Treanor concerning the latter's letter of May 17, 1934 after he had received a copy as a member of the Code Authority:

> "I want to show you Commission's Exhibit 7-A-B and ask you whether or not you received a copy of that letter, Mr. Hogan? A. Yes, I have received—as a member of the Code Authority, I received a copy of that letter.
>
> Q. Had you discussed any of the contents of the letter with Mr. Treanor prior to the time you received the copy? A. Oh, no.
>
> Q. Did you have any discussion with Mr. Treanor concerning this letter after you received the copy? A. Yes, after I received it, I did. I will put it this

[7] Com. Ex. 7 A-B.

[8] Com. Ex. 7 C.

way: I was very critical of the letter, and Mr. Treanor had apparently been told of my criticism and came to see me about it, and we had quite a heated and spirited discussion over the letter; I maintaining that Mr. Treanor was writing about something he knew absolutely nothing about, as it applied outside the State of California, or southern California, where he operated.

Q. Had Mr. Treanor done business in the East? A. No, I had been competing east of the Rocky Mountains since 1910, and never come in competition with Mr. Treanor in all that time, and I pointed out to him, and I said, John, you don't know how cement is sold east of the Rocky Mountains, any more than I do about how it is sold in southern California, and I don't know absolutely anything about it there.

We had quite a heated discussion and he stated that based on his experience he knew enough about the situation to give his opinion; and then he asked for my opinion as to what he wrote in that letter, and I said that doesn't make you competent to write about the whole cement industry the way you have written, because you don't know.

Q. From your discussion with Mr. Treanor at that time, did it develop whether or not he had had experience in selling any other place than California? A. No, he had not. He said he was operating in middle and southern California.'"

On May 29, 1934 M. H. McIntyre, Assistant Secretary to the President, wrote the following letter to Murray of the NRA, regarding the Code Authority's telegram of May 17, 1934:

"Reference is made to your memorandum of May Seventeenth attaching copy of telegram from the Code Authority for the Cement Industry it is suggested that the representatives of that industry have a hearing before Secretary Ickes and Admiral Peoples accordingly I am this day transmitting the cor-

[9] (R) Tr. 34573-75.

respondence to Secretary Ickes with the request that a suitable date be set for that purpose"[10]

At the time negotiations were being conducted by representatives of certain cement companies in the southeastern section of the country for the production of cement for TVA. Evidence relative to those negotiations is digested under Part IV E, *infra*, p. 970 *et seq.*

On June 4, 1934 Treanor, who was taking part in the negotiations with Dr. Morgan sent a telegram to the latter in which he set forth the letter of McIntyre to Murray, dated May 29, 1934, and then said:

[Italicised part quoted in Fdgs. Par. Seven (r)]

"THE TELEGRAM REFERRED TO FROM OUR CODE AUTHORITY WAS DATED MAY FIFTEENTH AND OF COURSE PRECEDED ALL OF OUR RECENT DISCUSSIONS STOP THE TELEGRAM CONTAINED A REQUEST FOR AN AUDIENCE WITH THE PRESIDENT TO *INFORM HIM OF THE CONFUSION WHICH WOULD RESULT FROM ANY SUMMARY ORDER TO CHANGE MARKETING METHODS LONG ESTABLISHED IN THE CEMENT INDUSTRY* STOP THE PURPOSES WHICH THE CODE AUTHORITY HAD IN MIND HAVE I BELIEVE LARGELY BEEN ACCOMPLISHED THROUGH THE CONFERENCES WITH DR. FETTER AND FEDERAL TRADE COMMISSION STOP ADDITIONALLY YOU AND DR. FETTER HAVE TALKED TO MR. MURRAY WHO IS DISPOSED TO AWAIT THE OUTCOME OF THE TVA INVESTIGATION STOP I DO NOT PRESUME TO MAKE ANY SUGGESTION TO YOU WITH REFERENCE TO THIS MATTER BUT I DO THINK THE UNRESERVED FACILITIES WHICH THE INDUSTRY IS AFFORDING YOU FOR A THOROUGH INVESTIGATION PROPERLY ENTITLE IT TO ASK NOT TO *BE REQUIRED TO DEAL WITH ANOTHER COMMITTEE UPON THE SAME SUBJECT AT THE SAME TIME* STOP I AM SURE IT CANNOT HASTEN BUT RATHER WOULD TEND TO DELAY ARRIVING AT A CONCLUSION STOP I FEEL THAT SECRETARY MCINTYRES LETTER WAS PROBABLY WRITTEN WITHOUT KNOWLEDGE OF THE PROGRESS WHICH WE HAVE BEEN MAKING STOP THIS IS AN ADDITIONAL REASON WHY I FEEL FREE TO WIRE YOU"[11]

Dr. Morgan, TVA Chairman, was examined by Commission's counsel in connection with the communications rela-

[10] Com. Ex. 350 C.

[11] Com. Ex. 350 C-D.

tive to the President's request, and he testified as follows concerning "differences of opinion within the industry":

"*By Mr. Wooden*:

Q. Were you aware, Dr. Morgan, that at about the time of these telegrams passing between you and Mr. Treanor that the President had requested NRA to ask the industry if it would not make an f.o.b. mill price basis for Government purchases?

* * * *

The Witness: I did not know it, as far as I can recall. I knew that the President was interested in the subject, but so far as I can recall I did not know that he was making any proposal to the industry.

By Mr. Wooden:

Q. It follows, of course, that you were not aware that the industry had expressed an unwillingness to comply with that request?

Mr. Leisure: I object to that also.

The Witness: May I correct my statement?

Examiner Norwood: Certainly.

The Witness: As I think about it, I think that John Treanor told me that the President had made certain proposals and that he hoped to have somebody see the President to explain the situation to him. I think that John Treanor gave me that information. I was thinking first of my talks—I talked this over with the President at times, and I was quite sure that he had not, but as I recall now, John Treanor told me that there was such a question up.

By Mr. Wooden:

Q. By 'such a question,' you mean whether the industry would make f.o.b. mill prices on Government purchases? A. I do not recall the exact substance of the issue, but I know that Mr. Treanor felt that there was a somewhat critical issue up there.

Q. Were you aware that Mr. Treanor was of a different mind on that particular question than the

rest of the industry or some other portions of the industry? A. My impression is that the industry—from talking with Mr. Treanor—the impression I got from him was that the industry was not a unit in the matter, that they felt that the problem had not been fully threshed out within the industry, and there were differences of opinion within the industry. That is my impression."[12]

On June 5, 1934 the Chairman of the Code Authority wrote the following letter to Conn, President of the Institute, about the inadvisability of carrying on two hearings [one on TVA and the other before Secretary Ickes and Admiral Peoples] at the same time on the same subject:

[Italicized part quoted in Fdgs. Par. Seven (r)]

"Enclosed is copy of letter from Mr. Murray referring to my letter of May 24th regarding the request from the President to quote f.o.b. mill prices.

Also enclose copy of letter from Mr. M. H. McIntyre to Mr. Murray and copy of Mr. Murray's letter to me.

After the receipt of these letters, Mr. Treanor was in Chicago and I asked him to take the matter up with Dr. Morgan, and I enclose copy of his telegram to Dr. Morgan.

I am now going to wait and see if this telegram produces results before following Mr. McIntyre's letter any further. I feel that we must not be carrying on two hearings on the same subject."[13]

Morgan, TVA Chairman, replied by letter dated June 7, 1934, to Treanor's telegram of June 4, 1934. The letter referred to a suggestion by the President that TVA cooperate with the Federal Trade Commission and the NRA with reference to a revision of the Cement Code and was as follows:

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[12] (C) Tr. 2008-09.

[13] Com. Ex. 859-4 K.

[Italicized part quoted in Fdgs. Par. Seven (r)]

"Your telegram was received before I left Washington but I did not have time to reply before leaving. On Tuesday, June 5, I had a talk with the President about our cement inquiry. *I told him that in case the basing point system should be abandoned, I thought it should be only on the development of some other policy which would avoid confusion and which could have general application.*

I was impressed with the fact that the President sincerely desires to work out a solution which will be equitable and practicable and fair to the industry, while fully safeguarding the interests of the public. As I thought would be the case, there was a complete absence of any arbitrariness of attitude. I spoke to the President very briefly. He wrote a hasty memorandum suggesting that the TVA cooperate with the Federal Trade Commission and with the NRA in reference to a revision of the cement code.

After my talk with the President, I talked with Mr. Barton W. Murray, who is now acting administrator of his division of the NRA. Mr. Murray was very cooperative in attitude and said that he should like to work with us. I then called Judge Healy, of the Federal Trade Commission, and expressed myself similarly to him. He also offered full cooperation. He spoke with appreciation of your recent visit to the Commission and said he thought it was very helpful.

I shall return to Knoxville tonight and shall discuss the situation further with our board. I hope that Mr. David can make the examination of the Price-Waterhouse records. I think we should discuss the general situation with the Federal Trade Commission and with the NRA as we go along. In case there is any information being put in our hands by the cement industry which you would not want to have available to other agencies, there should be a clear understanding on that. It is my hope that some conclusion may be reached which will be satisfactory to the Trade Commission and to the NRA as well as to the TVA. Inasmuch as access to the Price-Waterhouse data is available

through the courtesy of the cement industry, I shall want to be careful that everyone is informed of all the relationships so that there will be no danger of making unauthorized use of any data made available to us."[14]

G. Interpretations by the Code Authority.

The Code Authority from time to time issued and forwarded to all members of the industry Interpretations and General Letters relating to open price filing. These included the following:

General Letter, dated December 27, 1933, relative to the protest to NRA Administrator concerning the ruling of the Comptroller General that Code price filing was inapplicable to sales to the United States.[1] This letter is discussed *supra*, page 622.

Interpretation 57, dated January 31, 1934, entitled "Meeting Prices Filed".[2] This is discussed *supra*, page 674.

Interpretations 21, 32, 33 and 32A, dated in December, 1933 and January, 1934, relative to the proper method of quoting railroads.[3] In Interpretation 21 the Code Authority stated that railroads should be sold, in substance, as follows:[4]

"(1) On the same basis as hitherto, viz., f.o.b. mill or nearest junction point, at prices which have been filed with the Code Authority.

[14] Com. Ex. 350 E-F.

[1] Com. Ex. 1037.

[2] Resp. Ex. 2429 A.

[3] Com. Ex. 979 A-D.

[4] Com. Ex. 979 A.

(2) F.o.b. destination, at the same price, terms and conditions as to dealers at such destination."

The following interpretations and General Letters relate to quotations of prices to the United States Government on sales involving land grant freight rates:

Interpretation 16, dated December 23, 1933.[5]

General Letter, dated March 2, 1934, entitled "Destination Costs to United States Government".[6]

General Letter, dated March 29, 1934, entitled "Prices to United States Government."[7]

General Letter, dated April 14, 1934, entitled "Destination Costs to United States Government".[8]

General Letter, dated April 23, 1934, entitled "Destination Costs to United States Government."[9]

General Letter, dated June 19, 1934, entitled "Filing Prices and Government Destination Costs."[10]

Executive Letter, 52, dated May 27, 1935, entitled "Destination Costs to the United States Government."[11]

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[5] Com. Ex. 716 A.

[6] Com. Ex. 716 B.

[7] Com. Ex. 716 C-D.

[8] Com. Ex. 716 E.

[9] Com. Ex. 716 F.

[10] Resp. Ex. 2430 A-B.

[11] Com. Ex. 548-3 B.

Evidence relative to the above listed Interpretations and Letters is set forth in the discussion of the control clause in Part IV D, *infra*, pp. 829-39.

H. Handling of Complaints and Violations of Code by Code Authority.

Complaints as to Code violations were filed with the Code Authority by industry members, dealers and importers.[1] Competitors were a likely source of information as to violations consisting of selling at unfiled prices.[2]

By June, 1934, the Code Authority had handled or had in process 58 complaints either on its own initiative or complaint of industry members or by reference from the NRA. The Code Authority had completed investigation of most of these complaints. It found violations of the Code in 9 cases which it referred to the NRA. Ten complaints were withdrawn with the Code Authority's consent—23 were closed upon correction of the violation or upon the Code Authority's opinion that there was no violation or that it was unintentional and caused no appreciable hardship to the public or the industry. The violations so reported were of the following types:[3]

1. Selling at unfiled prices, including prices which had not been filed for the required 5-day period and selling f.o.b. truck without filing for truck delivery.

2. Announcing a price change prior to its operative date.

3. Unintentional violations through sales to the Government at unfiled prices where the seller was

[1] Resp. Ex. 183 A.

[2] Reiter, Chairman, Cement Code Authority (C) Tr. 17110-11.

[3] Resp. Ex. 183.

not able to withdraw its bid but paid for its error by shipping through another company to which it paid the filed price. Examples of this type of violation are set forth *supra*, at page 629.

4. Granting inducements to purchasers not allowed by the Code, including more favorable discounts.

The Code Authority complained to General Johnson of non-cooperation by the NRA in enforcement of the Code.[4] (See telegram set forth under Part XII C, *infra*, p. 2124.) Among the violations referred to the NRA for enforcement on which it took no corrective action were several cases where Government purchasing agents were successful in attempts to secure lower prices f.o.b. mill or f.o.b. destination than were filed by the bidders.[5]

The Code Authority ordinarily notified the manufacturer when it did not bid a filed price and asked for an explanation.[6] The following letter of the Code Authority to Aetna illustrates its method of handling complaints:

"THE CODE AUTHORITY

FOR THE

PORTLAND CEMENT INDUSTRY
CHICAGO

June 8, 1934

Mr. Harold S. Cree, Sales Manager
Aetna Portland Cement Company
2349 Union Guardian Building
Detroit, Michigan

Dear Sir:

Please refer again to complaint filed against you charging violation of Article X, Section 3 and Ar-

[4] Com. Ex. 559 A-C.

[5] Com. Ex. 277 K-M.

[6] Dawson, Vice President, Medusa (R) Tr. 40061.

ticle IX, Section 1 of the Cement Code, our notification to you being dated May 1.

We do not consider your letter of May 28 a complete reply to ours of May 24. In our letter referred to we state 'Complainant alleges that the price at which cement covered by this contract was sold was substantially under the price filed with the Code Authority f.o.b. Ann Arbor, Michigan, of $2.29 per barrel gross in cloth'; and ask that you furnish us supporting evidence of your sale at such price.

We definitely understand also from your letter of May 2 referring to this same matter that the destination filed with The Cement Institute of Dearborn, Michigan, is in error. By consulting the map we see that Dixboro is adjacent to Ann Arbor and it was for the reasons given in your letter that we suggested a change in destination as filed with The Cement Institute.

As this complaint now stands, there is a difference of fact between yourself and the complainant and, therefore, it would be most helpful to the Code Authority for you to furnish us some supporting evidence of your facts as previously requested. I am sure you will realize that the Code Authority has an entirely open mind on this matter and has arrived at no opinion, but we wish to arrive at a correct opinion as promptly as possible from facts presented by yourselves and the complainant and such other sources of information as are available to us.

Yours very truly,

Chairman

GHR:H

CC: Chas. A. Luck—Peerless"[7]

The record contains various letters between the Code Authority, manufacturers and Government departments relative to complaints and violations. Typical of these are the following:

[7] Resp. Ex. 2422.

Correspondence relative to bids on the TVA lettings for the Norris and Joe Wheeler Dams in March, 1934 where the Code Authority's investigation showed that most bidders had not filed their bid prices.[8]

Correspondence relating to the Bonneville Dam where the omission of the bidders to file their prices resulted in rejection of the bids and readvertisement.[9]

Correspondence with Alpha and Penn-Dixie in May, 1934 relative to bidding unfiled prices on the Government letting at Monroe, Louisiana.[10]

The minutes of the Code Authority also show how it handled violations in such cases as the prohibited refund of a bridge toll to a purchaser by one producer and marketing through the distributor for resale at an unfiled price.[11]

I. Price Filing After *Schechter* Decision; Trade Practice Committee.

Upon the announcement of the *Schechter* decision, the chairman of the National Industrial Recovery Board and other high officers of the Government made appeal for the voluntary continuance of codes.[1]

In support of this appeal the trustees of the Institute at a meeting on June 10, 1935 held for the stated purpose of clarifying the industry's position in the light of the *Schechter* decision, appointed the so-called Trade Practice Committee consisting of the members of the former Code

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[8] Com. Exs. 398 A-E; 399 A-H.

[9] Com. Ex. 159 (1-60).

[10] Com. Ex. 840 H-K.

[11] Com. Ex. 631.

[1] *Supra*, Part X A, p. 1818.

Authority, with direction to carry on as far as they legally could the functions formerly exercised by the Code Authority pending the enactment of new legislation.[2] On the following day Reiter addressed a letter to all members of the industry which recited an appeal of Richberg, Chairman of the NIRB, for cooperation in maintaining the standards of approved codes,[3] and then said:

> "The Board of Trustees have appointed a Trade Practice Committee of the Cement Institute, and the first members of that Committee are those who have recently served as members of the Code Authority, to wit: Messrs. F. M. Coogan, E. P. Lucas, J. F. Neylan, S. W. Storey, L. T. Sunderland, G. E. Warren and G. H. Reiter, Chairman.
>
> The Trade Practice Committee was instructed to continue in all legally possible ways to function in the same manner as the Code Authority. The Committee held its first meeting Monday, June 10, and instructed the Chairman to urge all members of the Cement Institute to continue to abide by all conditions of the Cement Code and specifically to continue the filing of prices, terms and conditions of sale.
>
> The Trade Practice Committee set Tuesday, June 25, as the date of its next meeting, by which time it was expected that the legislative situation regarding Codes and Industry agreements would be clarified. Should the Committee at that time determine that changes are necessary in the Trade Practice rules for this Industry it will promptly advise the Members.
>
> Meanwhile all Members of the Cement Industry are urged to continue their cooperation in making effective the standards of fair competition which have been established for this industry.

---

[2] Com. Ex. 223 A-C: Trustees' Meeting, 6/10/35.

[3] Richberg's appeal for cooperation is quoted fully in Part X, *infra*, at p. 1818.

> Be assured that this advice is sent to you after consultation with Counsel who will be consulted in regard to any further changes."[4]

The actual functioning of this Committee in respect of price filing, the principal activity of the Code Authority, was described by the witness Coogan, a member of the Committee, as follows:

> "A. As a matter of fact, that Trade Practice Committee consisted entirely of the Code Authority that had been in office when the Schechter decision came out. After that time we—under the Trade Practice Committee we continued for a time the activities as they were prescribed under the Code. Gradually this work was discontinued. Of course, after the Code it was entirely voluntary. There was the filing of prices and we did for a time handle complaints; that is, we handled them to the point of letting anybody know what somebody else had said about any action which they might have taken as regards prices, terms, or policies, but we didn't go any further than that because we had no authority whatever.
>
> Q. You say 'complaints', Mr. Coogan. What is your recollection as to that? What do you mean by that? A. I mean that complaints that had formerly come up under the Code and had been referred to the Code Authority, when any such complaints came up in the interim period, they were simply—the parties interested were simply notified. So far as I was personally concerned, I don't remember ever having filed a complaint, and I don't think I ever received one having been filed against me.
>
> Q. Well, what did you do with them, Mr. Coogan? What authority did the Trade Practice Committee have to deal with them? A. They had no authority whatever. All they did was to notify the interested parties and took no further action whatsoever."[5]

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[4] Com. Ex. 590 A-B; Resp. Ex. 31.

[5] Coogan, Vice President, Alpha (R) Tr. 23940.

Manufacturers who filed with the Trade Practice Committee did not consider that the Committee had any authority or power of compulsion. They accepted the Committee as providing temporary facilities for carrying forward the benefits of specific information afforded under the Code until such time as further legislation or administrative orders might deal with the situation.[6] They did not consider themselves obliged to follow any practice or terms set forth in the invalidated Code.[7]

The Committee took over the price files of the Code Authority and made no change in the manner of handling the work. F.O.B. mill prices and destination costs to the Government were filed and disseminated to interested manufacturers as during the code period.[8] The only difference was that filing, so far as member companies were concerned, was now on a purely voluntary basis and they understood they were not obligated to adhere to filed prices.[9]

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[6] Hawkeye: Manley, General Manager (R) Tr. 41621.
Monarch: Brooke, Vice President (R) Tr. 42320-21.
Reiter, Chairman, Cement Code Auth. (C) Tr. 2823-24.

[7] Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 39170-71.
Volunteer: Hanahan, President (R) Tr. 38639.

[8] Reiter, *supra*, Tr. 3817-18, 17000-02, 3691-93.

[9] Reiter, *supra* (C) Tr. 2824-25, 17005.
Alpha: Coogan, Vice President (R) Tr. 23944-45.
Dewey: Moore, R. W., Vice President (R) Tr. 46950.
National: Dannelly, Vice President (R) Tr. 39674-75.
Nebraska: Hoenig, Sales Manager (R) Tr. 42023.
Petoskey: Lucas, Vice President (R) Tr. 38830-31.
Com. Ex. 991: Reiter to Members, dated 12/12/35.
Resp. Ex. 740: Letter, Coogan to Reiter, dated 10/28/35.

After the *Schechter* decision many companies stopped filing prices at once.[10] By July 1, 1935 the industry as a whole did not conform with code price filing provisions and several companies ceased filing.[11] After three months only a few companies were continuing to file and by September the filing had become entirely ineffective. On December 9, 1935 the Trustees ordered filing discontinued[12] and the members of the Institute were so notified by Reiter on December 12, 1935.[13] Following the meeting of December 9, 1935, the Trade Practice Committee considered itself discharged (Resp. Ex: 127 A-B). Since then there has been no dissemination of price information by The Cement Institute.[14]

[10] Reiter, Chairman, Cement Code Auth. (C) Tr. 4003-04, 17065-66.
California: Blair, J. A., Chief Clerk (R) Tr. 42494.
Green Bag W. Va.: Wood, Treasurer and Manager (R) Tr. 29543.
Huron: Rooney, Vice President (R) Tr. 33664-65, 33708-09.
Meyers, Traffic Manager (R) Tr. 33407-08.
Missouri: Alexander, President (R) Tr. 37221-22, 37429-30.
Riverside: Beckett, President (C) Tr. 8994-96.
Volunteer: Parsons, Sales Manager (C) Tr. 5132-34.
Roberts, Traffic Manager (R) Tr. 31744.

[11] Com. Ex. 991: Reiter, *supra*, to Members, dated 12/12/35.
Reiter, *supra* (C) Tr. 17005, 17065-66.
Dewey: Moore, R. W., Vice President (R) Tr. 46949.
Edison: Sweeney, Vice President (R) Tr. 35804-05.
Hermitage: McGovern, Sales Manager (R) Tr. 36251.
National: Dannelly, Vice President (R) Tr. 39674-75.
Petoskey: Lucas, Vice President (R) Tr. 38704-05.
Superior Portland: Tongue, Secretary (C) Tr. 8418.
Universal Atlas: Affleck, President (R) Tr. 34980-81.
West Penn: McKee, Vice President (R) Tr. 27811.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35926-27.

[12] Com. Ex. 624: Trustees' Meeting, 12/9/35.

[13] Com. Ex. 991.

[14] Reiter, *supra*, Tr. 3929, 16932.

Describing the breakdown of price filing following the invalidation of the compulsory features of the Code, Reiter testified:

> "Q. Will you explain why price filing was discontinued at that time, if you know? A. Well, it was somewhat automatic, Mr. Leisure. Some members of the industry, and a large number, ceased filing prices at the time of the Schechter decision; others dropped out from time to time, and by the date of this letter there were very few prices offered for filing with the Trade Practice Committee, or The Cement Institute, and the plan was, therefore, ineffective.
>
> Q. Do you know whether or not after this Trade Practice Committee was set up, as you have described, whether there was any enforcement under that Committee of any kind? A. There was none whatever."[15]

Correspondence between the Trade Practice Committee and various respondents and minutes of meetings of Trade Practice Committee show eleven complaints filed and investigated between May 27, 1935, the date of the *Schechter* decision and September, 1935 some of which were unfinished as of May 27, 1935. These complaints related to the following matters:

(1) failure to file specified allowances to be made to dealers with other terms and conditions covering truck delivery;[16]

(2) bidding unfiled f.o.b. mill price by bidding commercial destination price and allowing Government to deduct commercial freight rate and ship on Government bill of lading;[17]

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[15] Reiter, Chairman, Cement Code Authority (C) Tr. 17066.

[16] Com. Exs. 278 A-F, 879-2 B, 1231.

[17] Com. Exs. 277-2 B-2 E, 585-2 C-2 E, 947-9 V, 591 A-C, 277-2 N-2 Q, 415 (39-40); Reiter, *supra*, Tr. 3478-80.

(3) bidding at unfiled prices on sales to dealers;[18]

(4) bidding below filed destination prices due to misinterpretation of destination as described in Government invitation;[19]

(5) bidding below filed destination price on a state letting;[20]

(6) bidding unfiled f.o.b. mill price on a Government letting;[21]

(7) shipping to Government on commercial bill of lading in violation of terms of bid which contained control clause;[22]

(8) bidding a filed destination cost to Government as a commercial destination price.[23]

Typical of the attitude taken by the Trade Practice Committee that adherence to price filing following the *Schechter* decision was merely voluntary are the following excerpts from two of its letters relative to complaints listed above:

In a letter dated June 6, 1935, the Trade Practice Committee said "The majority of the Code Authority feel that your filing should not have been accepted by this office and should (the Code to be effective) be cancelled from our files."[24]

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[18] Com. Exs. 290 D-F, 990 A-B, 591 F-G.

[19] Com. Exs. 277-2 G-2 K, 989 A-D, 591 F-G; Resp. Ex. 1734.

[20] Com. Exs. 594, 591 F-G.

[21] Com. Exs. 277-2 L-2 M, 947-10 C, 10 E, 948 D.

[22] Com. Ex. 919-2 I-2 L.

[23] Com. Ex. 174 A-J.

[24] Com. Ex. 1231.

Again in a letter, dated July 2, 1935, the Trade Practice Committee said "If the facts are as indicated herein, your allowance under this bid would be in violation of Code provisions. As indicated above, we recognize the purely voluntary nature of Code observance * * *."[25]

Reiter testified as to the handling of complaints by the Trade Practice Committee:

> "A. Well, an attempt was made by the Trade Practice Committee to handle them in a similar manner, to the manner in which they were handled by the Code Authority, but the attempt was unsuccessful, even so far as the complaints were concerned which were unfinished as of May 27, 1935, and no complaints were handled after that time to conclusion, because of lack of cooperation from members of the industry, * * *."[26]

[25] Com. Ex. 277-2 B.

[26] Reiter, Chairman, Cement Code Authority (C) Tr. 17069.

PART IV

SEALED BIDS TO GOVERNMENT AGENCIES

A. Sealed Bids to States: 1929-1938.

1. Summary

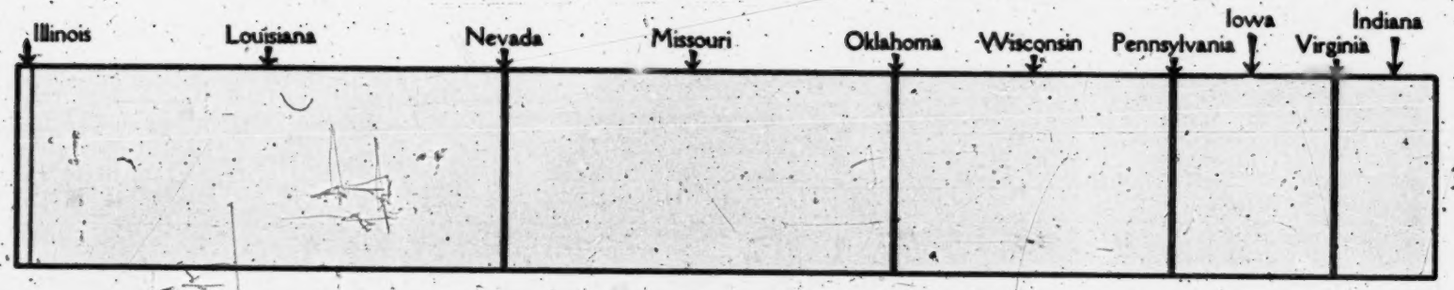
In evidence are invitations of 11 States for cement for highway and other use and bids in response thereto. The invitations are for a total of 76,794,468 barrels and are of four different types. Chart IV-A on page 702 shows the number of barrels called for with each of these types of invitation and also the extent of compliance by bidders in making their bids. In no case did any State invite bids f.o.b. mill only. In one case Illinois (April 12, 1933) invited bids on an alternate basis, f.o.b. destination and f.o.b. mill. Evidence as to this invitation and bids is set forth pp. 734 to 741 below. Illinois, Indiana and North Carolina on the occasions detailed below used special types of invitations which were variations of the usual type of f.o.b. destination invitation. Evidence as to these is also set forth below.

The supporting data from which Chart IV-A was made is set forth in subheadings 4, 5 and 6 below. The chart shows only invitations and bids in evidence and the extent to which each of the four types of invitations is used by the 11 States and other States generally is not reflected in the chart. Some testimony was given on this point.

In their Motion For Leave To Adduce Additional Evidence, respondents moved to adduce "incontrovertible evidence" rejected by the Trial Examiner "that public purchasing agencies generally request that they be quoted delivered prices" (Subject II, par. 28). The Commission in its Answer in Opposition to this Motion stated that "the evidence offered by counsel for the Commission in support

Type of Invitation

F. O. B. Destination



35,805,468 Barrels

F. O. B. Destination And F. O. B. Mill if shipment required of successful bidder into a county for which he does not hold a contract

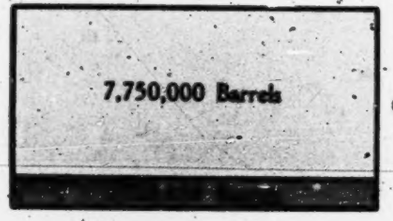
27,039,000 Barrels

Alternate A
F. O. B. Destination
and
Alternate B
F. O. B. Mill

3,300,000 Barrels

Grand Total Barrels
76,794,468

F. O. B. Destination And F. O. B. Mill if truck delivery desired



9,150,000 Barrels

"Base Market Prices"

1,500,000 Barrels

LEGEND

Compliance

Non-Compliance

THE WHEELER CHART CO., N. Y.

of the complaint already showed this was true and counsel for the Commission never disputed it and do not dispute it now." In their Reply to this Answer respondents accepted this concession and therefore do not press their motion to adduce this evidence. For the same reason the evidence on this point is not digested.

The great bulk of the invitations and bids in evidence are for the period from March 5, 1929 to December 7, 1933, the effective date of the NRA Code. The number of barrels for which bids were invited in different periods of time is as follows:

1. Pre-NRA Code: March 5, 1929 to Dec. 6, 1933	74,565,043
2. NRA Code: Dec. 7, 1933 to May 27, 1935	782,150
3. Post NRA Code: May 28, 1935 to July 2, 1937	1,255,963
4. Post-Complaint: July 3, 1937 to Oct. 14, 1938	191,312
Total	76,794,468

2. Price Identity

On the subject of the identity of cement prices, the Commission has found:

> "* * * In testifying, numerous officials of respondent companies have stated that ordinarily the commercial prices of all sellers of cement at any given delivery point are the same. * * * In general it is true that the commercial delivered prices of all respondents making sales of cement at any given location have been identical." Fdgs. Par. 9(a)

Respondents accept this finding in so far as it relates to the published or openly quoted prices of respondents. See Part II, *supra*, p. 203.

In affirmative defenses to the complaint herein, fifty-three respondents stated:

> "• • • the prices quoted at any particular destination tend to be uniform,—but not because any particular marketing method is employed. Effective competition itself tends to produce a uniform market price at a particular time, but the level of such a price fluctuates from time to time." (R. 274-275)

There is thus no issue as to the fact of substantial identity of price at any given time and place and the extent of it as shown in bids to States in the record will not be detailed. Evidence as to the influences that bring this about in connection with commercial prices is digested in Part II, *supra*, pp. 203 to 335. Evidence as to additional special influences that bring about substantial identity of sealed bids to State governments is digested herein.

3. How Prices Are Made and Special Factors in State Bids

a. Regular Commercial Prices

At the hearings before the Trial Examiner, Commission Counsel conceded that "There is no charge, your Honor, that competitors sat down around a table and agreed on the prices to be put in at any particular bidding".[1] The Commission found that there was no agreement as to the number and identity of base and non-base mills, thus: "The number and identity of base and non-base mills change from time to time. A base mill may, for reasons its management considers sufficient, become a non-base mill and, similarly, a non-base mill may become a base mill."[2] The Commission also found that there was no systematic exchange of basing point prices among the respondents, thus: "Except to the extent that the dissemina-

[1] Wooden, Commission Counsel, Tr. 24085; also Paulson, Commission Counsel, Tr. 27012; also MacIntyre, Commission Counsel, Tr. 27016.

[2] Fdgs., Par. 7(b).

tion of delivered prices during the NRA Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices."[3]

Executives of eighteen respondents testified that when they filed sealed bids with State agencies they bid their regular commercial prices at the destinations at which bids were requested. Testimony to this effect was given both in terms of general statements of company policy and also in terms of particular prices bid in response to particular invitations.[4]

Coogan, Vice President of Alpha, described the policy and procedure of his company in handling bids, as follows:

> "Well, when quoting on public work, with a few exceptions, we simply follow and quote the same prices

[3] Fdgs., Par. 9(e).

[4] Alpha: Coogan, Vice President (R) Tr. 24034-35.
Bessemer: Warren, F. B., Vice President (R) Tr. 32322.
Edison: Sweeney, Vice President (R) Tr. 35799.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29409-11, 29517.
Hermitage: McGovern, Sales Manager (R) Tr. 36329, 36385.
Keystone: Scott, H. M., President (R) Tr. 27560.
Lawrence: Ackerman, Vice President (R) Tr. 31195.
Lehigh: Bowen, Vice President (R) Tr. 27061-62, 27083-84.
Medusa: Dawson, Vice President (R) Tr. 40059-60.
Monarch: Brooke, Vice President (R) Tr. 42260.
Nazareth: Robeson, Vice President (R) Tr. 28043-44.
North American: Harte, Vice President (C) Tr. 8059-60.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38148, 38304.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37702.
Southwestern: Warren, G. E., Vice President (R) Tr. 28950-51.
Volunteer: Parsons, Sales Manager (C) Tr. 5094.
West Penn: McKee, Vice President (R) Tr. 27866-67, 27747-48.
Whitehall: Elliott, Vice President (R) Tr. 28601-03.

that we are quoting to our commercial customers at that same time and at that same destination.

* * * * *

* * * There was one in the State of Illinois in 1932 where we quoted a price to the State different from what we were currently quoting to our commercial customers." (Tr. 24034-35)

Further:

"Q. What is the machinery used by your company for handling this type of bidding: I mean, from the geographical standpoint? A. Well, ordinarily, when those inquiries come to our office, unless there is something very particular about the size or as to the delivery or specifications or something else, they are handled in an entirely routine way and don't come to the attention of anybody except the routine sales office employees, unless there is something special to be considered. Now, in the case of our eastern office, we handle all of the inquiries there in the northeastern section of the United States, and also unless there is some particular question, I don't see those inquiries until they come to me for signature after the bids have been prepared.

In the southern district the bids are made up at our Birmingham office. That covers the southeastern and Gulf section, in charge of Mr. Postelle, and in the Chicago office, they are made up under the direction of our western sales manager, Mr. Fellows." (Tr. 24039)

Bowen, Vice President of Lehigh put it this way:

"Our policy with respect to prices to both public and private buyers rests on the fact that the market is at the point of destination. We have what I would estimate would be some seven to eight thousand of such markets which are steady points of cement consumption, and for which we quote our prices regularly.

Sometimes these prices are prices we have originally quoted. Sometimes they are lower figures quoted by competitors and which we have met. At every one of these markets there is, thus, a market price. That market price is recorded in our records and is the price that we quote.

In some cases that price analyzed, along with other prices, reflects a base figure at a competitive mill. In other cases it does not.

In any event, all we know about competition is what we discover in the field. There is a minority of destinations in regular or steady outlets, or points of cement consumption for which we would have a market price established in the manner I have described. Only when such destinations are in areas where we have found competitors quoting prices lower than we would figure, is it necessary for us to calculate what our competitor's destination price is likely to be." (Tr. 27061-62)

Further:

"Public inquiries have varied greatly in form, and the way we have handled them has been just about like this:

Where we receive an inquiry from a public buyer calling for a price f.o.b. destination we have quoted our prevailing destination price for that destination.

* * *

* * *

* * * What I have said applies to cases where we find that our competitors are generally observing and maintaining their published quotations. In those cases we have anticipated that they will do likewise on public lettings although sometimes the event has shown us to be wrong.

When we have found from our observation that competitors are not generally respecting and observing their published quotations but are making prices and taking business at lower figures, we have sometimes proceeded on that assumption and have made prices in the Government bids such as we hoped would be low enough to get us the business." (Tr. 27083-84)

Evidence as to the ways in which different respondents determine their commercial prices in different markets and areas as well as evidence as to the factors that bring about substantial identity of prices at any given time and place, is digested in Part II—Cement Pricing—Commercial.

At the hearings the Commission put in evidence about 70 invitations issued at different times by 11 different States and tabulations of hundreds of bids, (thousands, if the price quoted at each destination is counted as a separate bid) in response thereto by a large number of respondent companies. The respondents in their defense presented responsible executives of each of the companies that had submitted these bids for the purpose of showing the independent action of and the methods employed by each bidder in determining the prices, terms and conditions of sale actually quoted, and the absence of any communication, understanding or agreement with any other bidder in connection therewith. Listed below in the order of their appearance on the witness stand are the names of the witnesses who testified on this subject, the invitations and bids to which their testimony was addressed, and the documentary evidence received in support of their testimony. The documentary evidence consists of office copies of bids, office work sheets used in the preparation of bids, office price records showing successful bids at the same price and destination on prior lettings and that the current market price was the same as the bid, all prepared in the regular course of business, and inter office memoranda and correspondence.

The foregoing evidence is not digested in view of the concession of Commission Counsel and the Findings recited in the first paragraph, p. 704 above. In their Motion For Leave To Adduce Additional Evidence, Subject I, par. 23, respondents recited that during the testimony of the second of these witnesses called on behalf of respondents the Trial Examiner, upon objection by Commission Counsel, began

to curtail this proof. As appears in the list below a considerable amount of this evidence was received on behalf of some respondents. Respondents also recited in their motion that a large amount of this evidence was excluded as to many respondents and as to some respondents substantially all evidence of this character was excluded and moved for leave to adduce further evidence of which a representative selection was set forth. For the same reasons given above for not digesting this evidence, respondents do not press this part of their motion.

Coogan: Vice President, Alpha

State	Date	Transcript Citation	Respondents' Exhibit No.
Pennsylvania:	5/26/37	Tr. 24147-79	784 A-C 785-93
Virginia:	6/18/36	Tr. 24157-59	795 A-F
Wisconsin:	3/20/31	Tr. 24374-77	

Fellows: Sales Manager, Alpha

Illinois:	3/22/29	Tr. 25494-511	983 A-B 984 985 A-M 986 A-B
Illinois:	1/ 3/30	Tr. 25511-17	982 A-B 987 A-N
Illinois:	2/ 5/31	Tr. 25517-29	988 A-B 989 990-994
Illinois:	3/ 6/31	Tr. 25537-53	996 A-B 997 A-R 998
Illinois:	3/26/31	Tr. 25553-70	999 A-B 1000 A-R 1001 A-C 1002-1003

State	Date	Transcript Citation	Respondents' Exhibit No.
Illinois:	1/ 6/32	Tr. 25570-90, 25617	1004-1010 1018 1020 A-C
Illinois:	2/ 3/32	Tr. 25591-619	1011 A-D 1012-1017 1019 A-B
Illinois:	2/20/33	Tr. 25623-30	1021 A-B 1022 A-S 1023 A-S
Illinois:	3/27/33	Tr. 25630-37	1024 A-U 1025 A-S 1026 A-E
Illinois:	4/12/33	Tr. 25638-40	1027 A-U 1028 A-U 1029
Illinois:	3/25/36	Tr. 25658-65	1036-1039 1040 A-V
Illinois:	3/30/37	Tr. 25665-68	1041-1043
Illinois:	12/28/37	Tr. 25668-72	1044-1046
Indiana:	4/23/29	Tr. 25683-97	1049 A-T
Indiana:	11/19/29	Tr. 25711-22	1053 A-O
Indiana:	3/13/31	Tr. 25723-28	1054 A-V
Brobston: President, Hercules			
New York:	4/30/36	Tr. 26301-08	1103-1105
Bowen: Vice President, Lehigh			
Louisiana:	1/19/31	Tr. 27026-29	1310-1314
Missouri	10/15/35 10/19/35 10/22/35	Tr. 27019-26	1301-1309
Pennsylvania:	5/26/37	Tr. 27008-18	1299 1300 A-C

McKee: Vice President, West Penn

State	Date	Transcript Citation	Respondents' Exhibit No.
Ohio:	6/12/36	Tr. 27867-68	
Ohio:	7/21/36	Tr. 27868-69	
Pennsylvania:	4/30/36	Tr. 27866-67	

Robeson: Vice President, Nazareth

Pennsylvania:	5/26/37	Tr. 28046-47	
Virginia:	6/18/36	Tr. 28044-46	
Virginia:	5/18/37	Tr. 28044-46	

Roberts: Traffic Manager, Volunteer

North Carolina:	2/27/36	Tr. 31885-87	
North Carolina:	2/11/37	Tr. 31887-88	
Virginia:	6/20/36	Tr. 31889-91	2283 A-D
Virginia:	8/30/37	Tr. 31892-94	2284 A-D

MacDonald, B. A.: Vice President, Northwestern States

Illinois:	1/ 6/32	Tr. 36619-22	2722-2723
Illinois:	3/25/36	Tr. 36623-27	
Wisconsin:	6/ 6/33	Tr. 36628-32	2725 A-C for Id.

Alexander: President, Missouri

Missouri:	1/20/31	Tr. 37289-91	
Missouri:	3/ 5/31	Tr. 37291-93	
Missouri:	10/10/31	Tr. 37293-94	
Missouri:	7/31/35	Tr. 37351-56	2811-2815 for Id.

Letzkus: Sales Manager, Pittsburgh

State	Date	Transcript Citation	Respondents' Exhibit No.
Indiana:	3/23/33	Tr. 37927-31	2886-2887
Pennsylvania:	4/30/36	Tr. 37934-35	2889 A-B
Pennsylvania:	5/26/37	Tr. 37932-33	2888 A-C

Manley: General Manager, Hawkeye

Illinois:	2/20/33	Tr. 41723-30	3387 A-S 3388 A-C 3389 A-E
Illinois:	3/27/33	Tr. 41731-36	3390 A-V 3387 A-S
Illinois:	6/ 5/33	Tr. 41741-55	3393 A-I
Iowa:	8/16/32	Tr. 41737-40, 41810-12	3392 A-B
Iowa:	11/24/31	Tr. 41737-40, 41810-12	3391 A-B

Hoenig: Sales Manager, Nebraska

Iowa:	12/ 5/29	Tr. 42088	
Iowa:	8/16/32	Tr. 42086-88	
Missouri:	3/ 5/29	Tr. 42084-86	
Missouri:	1/20/31	Tr. 42086	
Missouri:	11/ 7/32	Tr. 42086	

Brooke: Vice President, Monarch

Illinois:	3/22/29	Tr. 42211-13	
Iowa:	12/ 5/29	Tr. 42211	
Iowa:	8/16/32	Tr. 42206-11	
Missouri:	3/ 5/29	Tr. 42213-14	
Missouri:	12/19/29	Tr. 42214	
Missouri:	1/20/31	Tr. 42214-17	3426

b. Decline Clauses in Invitations

State invitations in evidence generally contain a clause to the effect that in the event of any reduction in market price by the bidder below the contract price the State shall have the benefit of the reduced price on the balance to be shipped under the contract.

A representative of the Iowa Highway Commission testified that under this clause the State "could take advantage of any decline in price that we could prove to be a quoted market price."[1]

Invitation forms used by eight states—Illinois,[2] Indiana,[3] Iowa,[4] Louisiana,[5] Missouri,[6] North Carolina,[7] Penn-

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[1] Blom, Assistant Administration Engineer, Iowa State H'way Comm. (C) Tr. 11680.

[2] Illinois: Com. Ex. 1885, clause 6, p. 4: Proposal dated January 6, 1932. See also Com. Exs. 1889 and 1891, clause 4, pp. 1 and 2: Proposals dated February 20, 1933 and March 27, 1933; Resp. Ex. 994 F, clause 6, p. 3; Proposal dated February 5, 1931; Com. Exs. 1881, 1883, Resp. Ex. 1043 C-D, clause 5: Proposals for 1936, 1937 and 1938.

[3] Indiana: Resp. Ex. 1049 E, clause 8, p. 3: 1929 Proposal. See also Resp. Exs. 1053 H, 1054 H and Com. Ex. 1859 J, clause 15: 1930, 1931 and 1933 Proposals.

[4] Iowa: Com. Ex. 1852 C, clause P-8: Invitation of December 5, 1929. Also Com. Ex. 1847 C, clause 8, Com. Ex. 1853 D, clause 8 and Com. Ex. 1854-4 P, clause 8: Invitations for 1931 and 1932.

[5] Louisiana: Com. Ex. 2455 E, clause 7: Invitation of June 14, 1935. Also Com. Ex. 2456 E, clause 7, Com. Ex. 2457 D, clause 8 and Com. Ex. 2458 D, clause 5: Proposals for January, 1935, January, 1931 and August, 1929.

[6] Missouri: Com. Ex. 2449 C, clause 6: Proposal of 1929. Also Com. Exs. 2448, clause 6; 2445 C, clause 6; 2444 C, clause 6; 2443 C, clause 6: Proposals for 1930, 1931, 1932 and 1933.

[7] North Carolina: Com. Exs. 3083 M and 3062 U: Requests for bids of 1936 and 1937. These requests give the State the benefit of any decline in price for two year periods.

sylvania,[8] and Wisconsin[9] are in evidence and all contain a clause of that sort.

The effect and operation of the decline clause is shown in several instances in the record.

The Illinois letting of January 6, 1932[10] required the successful bidder (Alpha was awarded 1,300,000 barrels) to meet any lower price made at any future bidding for the remainder of the State's requirements. At the letting of February 3, 1932 prices bid were 16¢ a barrel lower at destinations where Alpha had received an award and Alpha executed supplementary agreements with the State in which it met the lower prices.[11] After the February 3 letting Alpha's base at its La Salle, Ill. and St. Louis, Mo. mills on commercial business was reduced from $1.10 which it had been at both mills prior to the January 6 letting to 85¢ at La Salle and 95¢ at St. Louis which reflected the lower bids to the States on February 3.[12]

In the Illinois letting for 1931[13] bids were opened February 5, 1931 and around February 10 Alpha found prices lower than those quoted in Alpha's bid being quoted in the market for regular commercial business. Alpha at once met these quotations and by letter dated February 10 advised the State pursuant to the decline clause that the State would have the benefit of these lower prices on Alpha's bid. Marquette and Lone Star had bid below

[8] Pennsylvania: Com. Exs. 14, p. 24; 15 G, N, Q, W, X, 2 A: Invitation for April 30, 1936 and bids of May, 1937.

[9] Wisconsin: Com. Ex. 1916 C-D, clause 10: Proposal for 1930. Also Com. Exs. 1918 C, clause 10; 1919 C, clause 10; 1920 D, clause 10; 1921 D, clause 10 and 1922 C, clause 10: Invitations for 1931-1934 and 1938.

[10] See pp. 729-30, *infra*.

[11] See citations footnotes 12 and 13, *infra*, p. 731.

[12] Fellows, Sales Manager, Alpha (R) Tr. 25619-20, 25623.

[13] See p. 729, *infra*.

Alpha. All bids were rejected, however, but Fellows, Alpha's Sales Manager, did not know why.[14]

Bids received in response to the Wisconsin invitation of February, 1931 were all rejected on March 9 because the Wisconsin Highway Commission found that lower prices were quoted the State of Illinois at the letting of March 6 and Wisconsin readvertised for March 20 (Com. Ex. 1915). A representative of the Wisconsin Commission testified that that State's decline clause only operated in the event of a decline in the market where the cement was to be used and not in other States.[15]

In the North Carolina awards of February, 1937[16] delivered prices were reduced at North Carolina destinations for which contracts had been awarded and prices in all contracts were adjusted down to the new prices.[17]

In the Louisiana awards of 1931 Lehigh under the terms of that State's decline clause was required to give the State the benefit of price reductions that occurred in March, April and May of that year.[18]

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[14] (R) Tr. 25534-36.
Resp. Ex. 992 A-C.

[15] Astell, Senior Assistant Engineer, Wisconsin Highway Commission (C) Tr. 12188.

[16] See p. 750, *infra*.

[17] Com. Ex. 3062 K-L, N: Medusa.
Com. Ex. 3063 G-M: National.
Com. Ex. 3064 F: Volunteer.
Com. Ex. 3065 F, I-L: Universal Atlas.
Com. Ex. 3067 F: Penn-Dixie.
Com. Ex. 3068 F-G: North American.
Com. Ex. 3069 V-X: Alpha.
Com. Ex. 3070 F: Cumberland.
Com. Ex. 3071 G-K: Lone Star.
Com. Ex. 3072 E: Signal Mountain.
Com. Ex. 3075 F-I: Lehigh.

[18] Bowen, Vice President, Lehigh (R) Tr. 27028-29.
Resp. Exs 1310-1314.

c. Leave Given by States to Equalize Bids: Low Bids

In a number of instances in the record States have, after the opening of bids, permitted bidders who bid higher than others to meet or equalize the lower bids. The State of Missouri did this with its bids for 1930, 1931 and 1932 requirements. In the 1930 letting Marquette filed lower bids than its competitors and the State permitted Missouri, Universal Atlas and Alpha to meet these lower prices after the bids were opened.[1] At the March 5, 1931 letting the respondent Missouri bid prices that were lower than its current market prices because, according to the testimony of its President, Alexander,

> "• • • consumption of cement was declining rapidly, and we were quite anxious to keep our plants running, so we decided to reduce our price in an effort to secure more business." (Tr. 37291)

However, the State permitted its competitors to meet these lower prices and the respondent Missouri received about the same percentage of the total award as in previous years.[2] The experience of Lone Star in connection with the letting on October 10, 1931 for requirements for 1932 was different. Three days after the opening of bids Lone Star wrote to the Highway Commission reducing its bid prices by 20¢ at a large number of points.[3] Neylan, Ass't. General Sales Manager, explained the incident as follows:

> "My recollection is that we had bid the State of Missouri Highway Department. I think we were low at some points, and I think our bid was thrown out, I believe as the result of some secret negotiations with some of our competitors, and I think

[1] Alexander, President, Missouri (R) Tr. 37372.

[2] Id., Tr. 37291-93.

[3] Com. Ex. 1127 C: Letter dated Oct. 13, 1931, Lone Star to Highway Commission.

when it came to our notice, we went in and served notice that our price was in line with what we believed was being quoted secretly. This is my recollection of it. I am not positive of it.

• • •

They were still lower than our original bid, and my recollection is that our original bid was low." (Tr. 6407-09)

At this letting the respondent Missouri was again the low bidder, bidding substantially less than its current market prices at nearly all destinations. Alexander, President of Missouri, testified that his company did not receive any award on the basis of its low bids because the State permitted its competitors to meet these lower prices on a substantial part of the business on which it was low bidder.[4] The result of respondent Missouri's experience with bids to the State of Missouri was that it lost about a million dollars during the time.[5]

Indiana did the same thing with bids for its 1931[6] and 1932 requirements. In 1932 this was permitted for some of the companies with plants in Indiana. Awards were then made to those companies after bids had been equalized and had become identical.[7] In this instance Marquette, with mills outside the State, bid low at some 55 out of the 90 destinations for which bids were asked, but Lone Star, which had not bid low at any destination but which had an Indiana mill, received an award of 500,000 barrels and Marquette of 200,000.[8]

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[4] (R) Tr. 37293-94.

[5] Id., Tr. 37294.

[6] Com. Ex. 1875 A-B: Foley, Auditor, Purchasing Dept., Indiana State H'way Comm. (C) Tr. 11781-82, 11784-86.

[7] Id., Tr. 11809.

[8] Com. Ex. 1863: Foley, Auditor, Purchasing Dept., Indiana State H'way Comm. (C) Tr. 11799-800.

On the second letting in 1931 Astell, Senior Assistant Engineer of the Wisconsin Highway Commission testified that Lehigh and Marquette were low bidders and that the other bidders were permitted to revise their bids downward to meet this competition.[9]

In the Louisiana letting of August 19, 1929 to cover the State's requirements through 1931, Lone Star bid lower than the market at all 64 destinations for which bids were asked[10], but after bids were received there were negotiations with other bidders and the award was divided among five bidders and Lone Star received its share of the award at prices lower than it had bid.[11]

d. Correction and Withdrawal of Bids

There are five instances in the record in which bidders in response to State invitations attempted, either before or after the opening of bids, to correct or withdraw their bids.

LONE STAR BIDS IOWA, NOV. 24, 1931.

When the bids were opened and read on Nov. 24, 1931 the Lone Star representative reported to the New York office that Lone Star had quoted 4¢ under existing competition at Fort Dodge, Iowa and that a request had been made of the Commission to correct the bid or withdraw the entire bid. He also reported a "distinctly unfriendly attitude * * * towards bidders outside the State of Iowa."[1] On Nov.

[9] (C) Tr. 12161, 12165-67.

[10] Com. Ex. 2451: Tabulation of bids received Aug. 19, 1929 and prices on which contracts awarded.

[11] Com. Ex. 2451, *supra;* Henderlite, Chief Engineer, Louisiana H'way Comm. (C) Tr. 13806.

[1] Com. Ex. 1126 D-F: Letter dated Nov. 28, 1931, Robertson, Lone Star of Kansas to Neylan, Lone Star, New York.
Com. Ex. 1848: Letter dated Nov. 24, 1931, Lone Star of Kansas to Iowa State Highway Comm.

25, 1931 Neylan took their Indianapolis office to task for this error and said in part:

> "It is either caused by carelessness on the part of the party preparing the bid or improper supervision in the office. If your rate books covering the State of Iowa were properly maintained, such an error could not occur." (Com. Ex. 1126 C)

The Highway Commission would not permit the correction but was agreeable to a withdrawal of the entire bid.[2] Neylan testified that he criticized the Indianapolis office because they violated instructions to quote Lone Star's regular price. It may have been a clerical error. It was his recollection that Lone Star never got a barrel of business from Iowa anyway as all Iowa business was awarded to Iowa mills.[3]

LOUISVILLE (NON-RESPONDENT) BID: INDIANA, MARCH 23, 1933

After the opening of bids Louisville discovered that it had quoted a price for Valparaiso, Indiana 9¢ or 10¢ lower than its market price at that point. The mistake was made in transcribing the figure from the work sheet to the regular bid form. The Highway Commission was sympathetic but said they would hold Louisville to the bid. On the award that was made Louisville would have had to deliver 50,000 barrels at a considerable loss. They were "in a bad fix" and with the consent of the Highway Commission the matter was settled by Universal Atlas delivering the cement from its mill at a freight rate more attractive to it than to Louisville and in exchange Louisville delivered cement from its mill for Universal Atlas to points nearer freight-

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[2] Com. Ex. 1126 H: Letter dated Dec. 4, 1931, Lehaney, Lone Star of Kansas to Neylan, Lone Star, New York.

[3] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6394, 6398-400, 6680.

wise to the Louisville mill, both companies being under contract with the State.[4]

PITTSBURGH BID: PENNSYLVANIA, MAY, 1934

Pittsburgh quoted the Commonwealth of Pennsylvania a price for cement in paper bags by mistake in response to an invitation for a price in cloth bags. This was accepted and Pennsylvania was unwilling to let the company withdraw its bid and get out of it. Instead Pittsburgh asked Green Bag, Pa., with a mill nearer the destination, to ship this cement. Pennsylvania paid Pittsburgh the bid price and Pittsburgh in turn paid Green Bag, Pa. the current market price so Pittsburgh lost 25¢ a barrel on the order, the difference between the price in cloth and paper bags.[5] This incident occurred during open price filing under the NRA Code and related correspondence between Pittsburgh and the Code Authority is set forth under Part III A 3, *supra*, pp. 629-30.

LONE STAR BID: NORTH CAROLINA, FEBRUARY, 1937

In making its bid Lone Star bid $2.78 at Boone, North Carolina and $2.58 at Kenansville, North Carolina. In a letter dated April 15, 1937 Lone Star corrected these two prices to $2.70 and $2.56 respectively and the State accepted the corrections.[6] Betts, Purchasing Agent of the State Highway Department thought that this correction brought Lone Star in line with other bidders at Boone.[7]

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[4] Hill, Vice President, Louisville (C) Tr. 13236-42; Com. Exs. 1860-1862 A-B.

[5] Com. Ex. 984 J-K; Letzkus, Sales Manager, Pittsburgh (R) Tr. 37778-79.

[6] Com. Ex. 3071 D-E.

[7] (C) Tr. 380-81.

PENN-DIXIE BID: VIRGINIA, JUNE, 1937

After the opening of bids on June 20th Penn-Dixie wired the Highway Department asking that its bid at one point be changed from $2.36 to $2.20 a barrel but the Highway Department refused to do this.[8]

e. High Bids

In some instances companies bid high at certain destinations and did not bid for the entire quantity for which bids were invited.

Koch, Vice President of Lone Star testified that generally speaking in bids to States Lone Star observed a minimum mill net below which they would not go and recalled that Lone Star did this in bids to Louisiana, Missouri, Iowa, Illinois and Indiana in the period from about 1928 down to 1932 or 1933.[1] In doing this he testified that

> "* * *, there were two purposes. Some of the States in their proposals stated that a bidder that did not cover all points would not get the same consideration as the bidder that covered all of the points. (Tr. 32742)
>
> * * *
>
> Well, there was the other feature, that we wish to preserve a minimum net realized to us. We did not want to be burdened with a lot of cheap business, and none of it good business." (Tr. 32744)

This had the effect of making Lone Star bids higher than the bids of its competitors at certain points. Koch recalled that Louisiana, Missouri and Iowa were three States that required the bidder to bid at all points.[2] He denied that this was done with the purpose of making Lone Star

[8] Com. Ex. 154 C-E.

[1] (R) Tr. 32740-41.

[2] Id., Tr. 32745.

low at certain points and its competitors low at other points.[3]

Neylan, Assistant General Sales Manager of Lone Star, testified that in the 1932 bids to Indiana and Illinois Lone Star bid for a million barrels to each State because the total of the invitations (1,400,000 Indiana and 3,000,000 Illinois) was more than the capacity of their Limedale, Ind. mill which was 3,000,000. They couldn't possibly supply this much and take care of their dealer trade.[4]

Hawkeye also set a minium mill net below which it would not go in its bids to Illinois of March 27, 1933 and bid high at points that would not net the minimum.[5]

Northwestern States did the same thing in its bid to Illinois in March, 1936.[6]

4. F.O.B. Destination Invitations and Bids

Chart IV-A on page 702 shows invitations for f.o.b. destination bids for a total of 35,805,468 barrels of cement between March 5, 1929 and October 14, 1938. The chart also shows full compliance by bidders with these invitations. Bids on the Indiana invitation of December, 1932 were rejected. Bids on the Missouri invitation of January, 1931 and on the Wisconsin invitation of February, 1931 were also rejected and in both cases were re-advertised. All of these invitations and the bids in response thereto are included.

The evidence from which the chart was made, arranged by states and in chronological order for each state, is as follows:

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[3] Koch, Vice President, Lone Star (R) Tr. 32806.

[4] (C) Tr. 6648-50.

[5] Manley, General Manager, Hawkeye (R) Tr. 41732-33.

[6] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36623-25.

State	Date of Invitation or Bids	Citation	Quantity
Illinois	Mar. 25, 1936	Com. Exs. 1883, pp. 11-14, 1878	125,000
"	Mar. 30, 1937	Resp. Ex. 1043 L-O Com. Ex. 1879	125,000
"	Dec. 28, 1937	Com. Exs. 1881, 1880	100,000
Indiana	Apr. 23, 1929	Resp. Ex. 1049 C, H Com. Ex. 1877	1,300,000
"	[1]Dec. 22, 1932	Com. Ex. 1856	1,400,000
Iowa	Dec. 5, 1929	Com. Exs. 1851 A-L, 1852 A	2,000,000
"	Nov. 24, 1931	Com. Exs. 1846 A-C, 1853 B	1,000,000
"	Aug. 16, 1932	Com. Exs. 1849 A-C, 1854 U	1,000,000
Louisiana	Aug. 19, 1929	Com. Exs. 2451, 2458 I, K	2,888,000
"	Jan. 19, 1931	Com. Exs. 2452 A-C, 2457 H-M	8,645,000
"	Jan. 18, 1935	Com. Exs. 2454 A-B, 2456 K-O	280,000
"	June 14, 1935	Com. Exs. 2453, 2455 J	36,030
Missouri	Mar. 5, 1929	Com. Exs. 2437, 2449 B, J-M	1,100,000

[1] Bids rejected.

State	Date of Invitation or Bids	Citation	Quantity
Missouri	Dec. 19, 1929	Com. Exs. 2438, 2448 K-O	2,094,700
"	[2]Jan. 20, 1931	Com. Ex. 2439	1,662,400
"	Mar. 5, 1931	Com. Exs. 2440 A-B, 2445 L-O	1,662,400
"	Oct. 10, 1931	Com. Exs. 2441 A-B, 2444 J-M	1,654,000
"	Nov. 7, 1932	Com. Exs. 2442 A-B, 2443 J-M	1,553,300
"		Com. Ex. 2450	31,165
Nevada	Dec. 17, 1935	Com. Ex. 1212 A-B	400
Oklahoma	Jan. 17, 1935	Com. Ex. 2471 Resp. Ex. 3674	2,150
"	Jan. 6, 1936	Com. Ex. 2493 Resp. Ex. 3687	450
"	Mar. 8, 1936	Com. Ex. 2495 Resp. Ex. 3686	2,250
"	Mar. 12, 1936	Com. Ex. 2496 Resp. Ex. 3686	132
"	Mar. 18, 1936	Com. Ex. 2497	175
"	Mar. 25, 1936	Com. Ex. 2498 Resp. Ex. 3684	150
"	Apr. 9, 1936	Com. Ex. 2499 Resp. Ex. 3683	450
"	Apr. 10, 1936	Com. Ex. 2500 Resp. Ex. 3682	390

[2] Bids rejected.

State	Date of Invitation or Bids	Citation	Quantity
Oklahoma	Apr. 18, 1936	Com. Ex. 2501 Resp. Ex. 3681	900
"	May 16, 1936	Com. Ex. 2503 Resp. Ex. 3680	200
"	June 20, 1936	Com. Ex. 2505 Resp. Ex. 3679	750
"	July 1, 1936	Com. Ex. 2506	132
"	July 8, 1936	Com. Ex. 2595 Resp. Ex. 3675	350
"	Aug. 17, 1936	Com. Ex. 2507 Resp. Ex. 3678	900
"	Sept. 17, 1936	Com. Ex. 2510	500
"	Oct. 2, 1936	Com. Ex. 2514	6,250
"	Nov. 26, 1936	Com. Ex. 2512	1,700
"	Jan. 2, 1937	Com. Ex. 2528	1,200
"	Mar. 13, 1937	Com. Ex. 2536	2,000
"	July 24, 1937	Com. Ex. 2558	2,295
"	July 24, 1937	Com. Ex. 2559	1,800
"	July 24, 1937	Com. Ex. 2560	1,560
"	July 27, 1937	Com. Ex. 2556	1,200
"	Aug. 10, 1937	Com. Ex. 2568	3,000
"	June 27, 1938	Com. Ex. 2585	725

State	Date of Invitation or Bids	Citation	Quantity
Oklahoma	Aug. 15, 1938	Com. Ex. 2590 Resp. Ex. 3677	600
"	Oct. 14, 1938	Com. Ex. 2594 Resp. Ex. 3676	132
Pennsylvania	Apr. 30, 1936	Com. Ex. 15 B, D	1,200
"	May 26, 1937	Com. Ex. 14 A-B Resp. Ex. 784 A-B	4,454
Virginia	June 20, 1937	Com. Ex. 9 A-C Resp. Ex. 795 B-C	20,000
"	June 25, 1937	Com. Exs. 10 A-D; 155 A	25,000
Wisconsin	Dec. 28, 1929	Com. Exs. 1908, 1916 C, I	1,500,435
"	[1]Feb. 18, 1931	Com. Ex. 1909	1,384,643
"	Mar. 20, 1931	Com. Exs. 1910, 1918 A-G	1,300,000
"	Nov. 28, 1931	Com. Exs. 1911, 1919 A, C	1,100,000
"	June 6, 1933	Com. Exs. 1912, 1920 A, G-I	1,200,000
"	Mar. 9, 1934	Com. Exs. 1913, 1921 A, C	500,000
"	May 12, 1938	Com. Exs. 1914, 1922 A; E	80,000
		Total barrels	35,805,468

[1] Bids rejected.

5. F.O.B. Destination and F.O.B. Mill Invitations and Bids

a. Illinois

In its invitations for the years 1929, 1930, 1931, 1932 (two invitations) and 1933 Illinois used a form of invitation calling for bids f.o.b. cars at county seats of named counties and also for bids f.o.b. bidder's mill if shipment was required into any county other than one in which a contract was awarded to the successful bidder. The language of this type of invitation follows:

> "3. The bidder shall indicate the maximum number of barrels of cement he will furnish under this contract and the price per barrel packed in cloth sacks meeting the requirements of Section 8(a) of these specifications, f.o.b. cars at the county seat in the counties named in the proposal. Cement to be furnished in carload lots.
>
> • • •
>
> 5. It is expected that the cement required in each county will be supplied by the company to whom contract for such cement is awarded, but if in the opinion of the Department conditions make it necessary, the Department may require the successful bidder to furnish cement in any county in the State other than in those in which a contract for cement is specifically awarded to the successful bidder provided that when cement is ordered shipped into any other such county, the price per barrel in cloth sacks shall be $..... f.o.b. cars at the bidder's mill located at....."[1]

In evidence are invitations of this type for the above years inviting bids for a total of 27,039,000 barrels of cement. This figure is in excess of the cement requirements of the State because, as shown in the detail that follows, in 1932 Illinois invited bids for 5,000,000 barrels but

[1] Com. Ex. 1900, pp. 1-2.

awarded contracts for only 1,300,000 and then readvertised for 3,439,000. Invitations for 8,439,000 are included in the chart. In 1933 bids in response to an invitation for 3,300,000 were rejected and readvertised for the same amount. Invitations for 6,600,000 are included in the chart. These apparent duplications are included because they were invitations in response to which bids were submitted.

In a third invitation for 1933 Illinois used another type of invitation, again for 3,300,000 barrels, which is set forth below.

The detail of the invitations and bids included in the chart follows:

1929

Bids on 3,000,000 barrels for highway use in 1929 were invited at 102 county seats. 19 companies bid for amounts ranging from 200,000 barrels to a maximum of 2,000,000 and at destinations ranging from 7 to the total of 102 (8 bid at 102). 8 out of the 19 bidders also submitted bids f.o.b. mill in response to clause 5 of the invitation above.[2]

Awards of the total of 3,000,000 barrels were divided among 9 of the bidders, 2 of whom were among the 8 who had submitted f.o.b. mill bids.[3]

1930

Bids on 4,000,000 barrels for highway use in 1930 were invited at 102 county seats. 15 companies bid at destinations ranging from 22 to the total of 102 and for various

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[2] Com. Ex. 1899 A-B.

Ash Grove	Monarch
Kosmos	Missouri
Lone Star	Northwestern States
Louisville	Southwestern

[3] Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11946.

amounts. 7 out of the 15 bidders also submitted bids f.o.b. mill in response to clause 5 of the invitation, above.[4]

1931

Bids on 5,000,000 barrels for highway use in 1931 were invited at 102 county seats. 15 companies bid for various amounts at different destinations and 7 submitted bids f.o.b. mill in response to clause 5 of the invitation, above.[5] All bids were rejected.[6]

1932

JANUARY 6, 1932: Bids on 5,000,000 barrels for highway use in 1932 were invited at 102 county seats. 14 companies bid for amounts ranging from 150,000 barrels to the maximum of 5,000,000 and at designations ranging from 8 to the total of 102 (7 bid at 102). 8 out of the bidders also submitted bids f.o.b. mill in response to clause 5 of the invitation, above.[7]

Alpha was low bidder and was awarded 1,300,000 barrels being the amount for which it had submitted its bid.[8] In making this award the Illinois Department of Public

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[4] Com. Ex. 1191 C-F, H; Resp. Ex. 987 D, E, M.

Ash Grove	Monarch
Consolidated	Missouri
Kosmos	Southwestern
Lone Star	

[5] Resp. Exs. 994 A-R, 990 A-B.

[6] Fellows, Sales Manager, Alpha (R) Tr. 25535-36.

[7] Com. Exs. 1884, 1885, page 3; Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11867; Resp. Exs. 1007, 1009.

Alpha	Louisville
Ash Grove	Missouri
Kosmos	Northwestern States
Lone Star	Wabash

[8] Hamlin, *supra*, Tr. 11948-49.

Works wired Alpha that shipments under the contract would depend upon Alpha meeting any lower prices of Alpha or others in future bidding for the remainder of the State's requirements or in future market changes at the destinations.[9]

FEBRUARY 3, 1932: Bids on 3,439,000 barrels for highway use in 1932 were invited at 102 county seats. 10 companies bid for amounts ranging from 250,000 barrels to the maximum of 3,439,000 and at destinations ranging from 17 to the total of 102 (5 bid at 102). 7 out of the 10 bidders also submitted bids f.o.b. mill in response to clause 5 of the invitation, above.[10]

Awards were made as follows:

Marquette	2,500,000 barrels
Dewey	166,000 "
Missouri	139,000 "
	2,805,000

The total amount of cement awarded to Alpha under the January 6 letting (1,300,000 barrels) plus the total offered by and awarded to Marquette as low bidder at the February 3 letting was not sufficient for the State's requirements so amounts shown above were awarded to Dewey and Missouri as second low bidders.[11]

Alpha did not bid on this second letting as it had received an award of 1,300,000 barrels on the January letting but under the January letting Alpha was required to meet any lower prices on which awards were made at the later

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[9] Resp. Ex. 1010.

[10] Com. Ex. 1886.

Ash Grove	Lone Star
Kosmos	Louisville
Lehigh	Missouri
	Universal Atlas

[11] Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11949-51.

February letting. An Alpha representative attended the February letting and a list was prepared showing the county seats and the number of barrels on which Alpha would have to meet lower prices.[12] Correspondence followed between Alpha and the Illinois Highway Department on this subject and Alpha entered into supplementary agreements with the State in which it met the lower February prices covering the 1,300,000 barrels awarded in the January letting.[13]

1933

FEBRUARY 20, 1933: Bids on 3,300,000 barrels for highway use in 1933 were invited at 102 county seats. 16 companies bid for amounts ranging from 150,000 barrels to the maximum of 3,300,000 and at destinations ranging from 19 to the total of 102 (6 bid at 102). 5 out of the 16 bidders also submitted bids f.o.b. mill in response to clause 5 of the invitation, above.[14]

All bids were rejected.[15]

MARCH 27, 1933: Readvertisement for bids on 3,300,000 barrels for highway use in 1933 at 102 county seats. 16 companies bid for amounts ranging from 250,000 barrels to the maximum of 3,300,000 and at destinations ranging from 19 to the total of 102 (7 bid at 102). 4 out of the 16 bidders

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[12] Fellows, Sales Manager, Alpha (R) Tr. 25596-93, 25597-98, 25610-13.
Resp. Exs. 1010, 1011 A-D.

[13] Resp. Exs. 1013 A-B, 1014 A-B, 1015, 1016 A-B, 1017 A-B, 1018, 1020 A-C.
Fellows, *supra*, Tr. 25596-99, 25615-17.

[14] Com. Exs. 1888, 1889, par. 6, pp. 13-16.

Ash Grove	Northwestern States
Kosmos	Wabash
Missouri	

[15] Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11899.

also submitted bids f.o.b. mill in response to clause 5 of the invitation, above.[16]

After receipt of these bids, Robert Kingery, Acting Director of Public Works and Buildings, made the following announcement:

> "* * * There were 17 bidders, which included all companies having plants located in or directly adjacent to Illinois. The total amount of cement offered in these bids was 19,547,000 barrels of Standard Portland cement and 925,000 barrels of High Early Strength cement. It is significant that the amount offered was nearly six times the amount of cement actually required for the season's construction.
>
> Prices showed a sharp advance over those of 1932, being approximately 68¢ per barrel higher. Commenting on this, Mr. Kingery states that while the figures are rather higher than expected, they are in accordance with the present commercial market price and are closely in line with the prices which have been quoted recently to other state highway departments. It was hardly expected that the remarkably low prices for 1932, or even for 1931, could prevail in 1933, because it is a very significant fact that the prices for these two years were the result of a competitive price cutting campaign due to an inactive market, which could hardly be expected to continue without serious loss to the cement companies.
>
> An analysis of the prices received Monday as compared with those for which the State bought cement during the past 14 years indicates that with the exception of 1931 and 1932, the 1933 prices are appreciably lower than any other year. This is shown in the following tabulation:

1919	$2.04	per barrel
1920	2.03	" "
1921	2.04	" "
1922	1.86	" "

[16] Com. Exs. 1890, 1891, par. 6, pp. 13-16.

1923	$2.06	per barrel
1924	2.15	" "
1925	2.15	" "
1926	2.15	" "
1927	2.20	" "
1928	2.00	" "
1929	1.98	" "
1930	1.78	" "
1931	1.29	" "
1932	.94	" "
1933	1.62	" "

The above prices represent the net cost of the cement to the State and they include the freight rate from mill to the point of destination: that is, this price is the actual price of cement laid-down on the job.

Comparing the 1933 prices against the average for the years 1926 to 1930, inclusive, shows a reduction in price of 20 per cent, and a comparison of the prices against the average for the period 1919 to 1930 inclusive, shows a reduction in price of 21 per cent, and a comparison against the average for the past five years, 1928-1933, inclusive, which includes the two low years of 1931 and 1932, shows an increase of only one per cent.

The prices quoted Monday are substantially in accordance with the present commercial market price, but a clause in the proposal protects the State against any increase during the period that the contract is in force; likewise any reduction in the commercial market price will be extended to the state. A complete analysis of the various bids with particular reference to protecting Illinois products is being made before definite awards will be announced."[17]

[17] Resp. Ex. 61 A-C.

All bids were rejected and Hamlin, Office Engineer of the Illinois Division of Highways, did not know why these bids as well as the February bids, were rejected.[18]

APRIL 12, 1933: Readvertisement for bids on 3,300,000 barrels. Bids were invited for 3,300,000 barrels under a new type of invitation calling for bids under Alternate A, f.o.b. mill and under Alternate B, f.o.b. the 92 county seats. Hamlin, Office Engineer of the Illinois Division of Highways, testified that this was the only time the State had ever asked for f.o.b. mill bids.[19] The language of this invitation is as follows:

"*PROPOSAL*

The bidder shall submit a bid on both Alternate A and Alternate B.

A. Alternate A.

• • •

1. Portland cement:

At a price of ..... per barrel f.o.b. cars in cloth sacks at the bidder's mill located at .....,....., and at a price of ..... per barrel f.o.b. cars in cloth sacks at the bidder's mill located at .....

2. High-early-strength Portland cement:

At a price of ..... per barrel f.o.b. cars in paper sacks at the bidder's mill located at ....., and at a price of .....: per barrel f.o.b. cars in paper sacks at the bidder's mill located at .....

In addition to each price indicated above the bidder shall prepay the freight charges from said mill to destination, which charges shall be included on the invoices covering each shipment.

[18] (C) Tr. 11899, 11901.

[19] (C) Tr. 11905.

B. Alternate B. In accordance with the Advertisement, conditions and Specifications attached hereto and which are a part hereof, the undersigned proposes to furnish Portland cement in cloth sacks to the Department of Public Works and Buildings at the price enumerated in Column 3 of the Price Sheet, and high-early-strength Portland cement in paper sacks at the prices enumerated in Column 4 of the Price Sheet. * * *

ALTERNATE B PRICE SHEET

COUNTY	ESTIMATED AMOUNT OF PORTLAND CEMENT REQUIRED BARRELS	PRICE PER BARREL F.O.B. COUNTY SEAT FOR PORTLAND CEMENT IN CAR LOAD LOTS (INCLUDING CLOTH SACKS)	PRICE PER BARREL F.O.B. COUNTY SEAT FOR HIGH-EARLY-STRENGTH PORTLAND CEMENT IN CAR LOAD LOTS (INCLUDING PAPER SACKS)"[20]

15 companies bid Alternate B and none bid under Alternate A.[21]

Evidence is in the record of five companies as to why they did not submit bids f.o.b. mill under Alternate A as follows:

ALPHA

On April 6, 1933, Fellows, Alpha Sales Manager wrote to Coogan, Alpha Vice President, calling his attention to Alternate A and recommending that no f.o.b. mill price be submitted.[22] On this Fellows testified:

"In going over this proposal deciding whether or not we would bid on alternate 'A', alternate 'A' is the bidding of a price f.o.b. mill. Down at the

[20] Com. Ex. 1893, pp. 12-14.

[21] Hamlin, Office Engineer of the Illinois Division of H'ways (C) Tr. 11905; Com. Ex. 1892.

[22] Resp. Ex. 1029.

bottom of alternate 'A', it states, 'In addition to each price indicated above, the bidder shall prepay the freight charges from said mill to destination, which charges shall be included on the invoices covering each shipment'.

Well, now, that was meant that if we quoted a mill price they would add on the freight from our mill to destination. We would have to prepay it, so it would cost them that much more, and we would be unable to meet the competition at destination where the State was going to use the cement, and where we wanted to be competitive. And had we quoted an f.o.b. mill price, well, we didn't just—we didn't know how to quote an f.o.b. mill price that would allow us to meet competition at destination points, because we would have had to have a different mill price for almost every destination in order to meet the variance in freight rates. So we did not bid an f.o.b. mill price." (Tr. 25642-43)

Instead Alpha used the same work sheets it had used for the earlier bids and bid its commercial f.o.b. destination prices under Alternate B.[23] Following the rejection of the bids Illinois authorities asked permission to examine Alpha's books and Alpha permitted this examination.[24] After that Illinois proposed to lease the Alpha plant but after discussion Alpha decided not to do this as they would be unable to take care of their dealer trade which amounted to about 80% of their business.[25]

MARQUETTE

Marquette, in a written statement by Wecker, President to an F.T.C. investigator, explained its failure to bid f.o.b. mill, as follows:

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[23] Fellows, Sales Manager, Alpha (R) Tr. 25640, 25643.

[24] Id., Tr. 25645-46, 25651-52.

[25] Id., Tr. 25657-58.

"We made no bid under Alternate 'A' of the specifications for the requirements of cement of Cook County and State of Illinois in the proposals of April 17, 1933 and April 12, 1933 requiring a price on cement f.o.b. our mill because to name one single price f.o.b. our mill, which would, with freight we or the buyer would have to pay to the various destinations added, be as low as the delivered prices we anticipated competitors more closely situated to certain destinations would make, would necessitate reducing such an f.o.b. mill price much below the net price at our mill which we hoped we would obtain from the delivered prices we quoted. This we were unwilling to do, first because we felt we had to have the higher net price at our mill and, second because the naming of a price f.o.b. our mill, higher than that we computed it would have to be in order to compete with delivered prices of others more closely situated to certain destinations, would eliminate us from access to needed tonnage and thus restrict the area in which such an f.o.b. price would be effective. The net result would be an undesirable restriction of the tonnage we could get. The average net price we would receive at our mill from the delivered prices we quoted we considered satisfactory. The use of such an average 'net price at mill' as an 'f.o.b. mill price', would reduce the delivered cost to the buyer under the delivered prices we quoted, wherever our freight to a destination is less than from other mills but would make the delivered cost to the buyer higher than the delivered prices we anticipated our competitors would quote, in all cases where the freight from competitors' mills is less than from our own." (Com. Ex. 2607)

LONE STAR

On April 28, 1933 Struckmann, former President of Lone Star, wrote a long letter to Governor Horner of Illinois explaining why their Indiana subsidiary had not submitted an f.o.b. mill bid under Alternate A, and Neylan, Lone Star's Assistant General Sales Manager, was examined

by Commission Counsel regarding this letter. The letter and Neylan's testimony appear in Part I, *supra*, pp. 190 to 193.

KOSMOS

Kosmos, in a written statement by its President Horner to an F.T.C. investigator, explained its failure to bid f.o.b. mill as follows:

> "Cement, a cheap and heavy commodity, the freight on which is an important factor in the cost to the user, has always been bought and sold on the basis of the delivered cost. In practice this has made a number of brands available at any consuming point, with a very strong tendency for the prices on the various brands at any such point to be the same, because cement is a highly standardized article and it is impossible to sell any considerable quantity of one brand at a higher cost to the consumer than another. Each brand may have a different mill net for each point it reaches under these conditions, depending upon the differences in the freight rates.
>
> The opposite method to this would be for us to have a price at our mill at which we would sell and below which we would not go in individual cases—that is, at any one time our mill net from all our customers would be the same. Assuming that this method would apply to other cement mills, the result would be that we would have a natural monopoly in the area to which our freight rates are lowest. The cost of our cement delivered would be the lowest and no dealer or user could afford to buy another brand and so handicap himself with a higher cement cost in competing with others. It may be that cement would be distributed most economically by this method. But there are many things to be said against it. Monopoly in any market has never been acceptable in this country in general business.
>
> With the foregoing explanation we think the net effect upon us of bidding a mill price to Illinois will be apparent. We were asked to make one price at

our mill applicable upon all of the State business given us and to reduce this price to equal the lowest net we might accept on any other business.

We maintain a base price at our mill but we would not realize it out of the delivered prices we bid to Illinois because our freight rates are nowhere the lowest. It would be futile, therefore, to bid our base price. But, had we made a less price f.o.b. cars at our mill, other manufacturers would have considered that we had lowered our mill base and would have quoted accordingly on other business. Furthermore, they would probably have lowered their own mill bases correspondingly. We would have made it expensive for them to come into our area and they would naturally make it equally expensive for us to go into theirs. In going into their territory at higher freight rates than theirs, we would net less than our own base price; by the terms of the State's proposal the mill price to Illinois would come down to the lower net, then our base price would follow and so on. We would be in a never ending downward spiral." (Com. Ex. 2189 A-B)

Royal, F.T.C. Attorney, testified as to interviews with officers of Hawkeye, Northwestern States and Universal Atlas in which he asked them why they had not bid f.o.b. mill in response to this Illinois invitation. Royal's testimony is set forth in Part II, *supra*, pp. 185 to 186.

MEDUSA

J. B. John, President of Medusa, corresponded with Governor Horner, and his letter to the Governor dated May 1, 1933 together with the cross examination of Dawson, Vice President of Medusa regarding this letter appear in Part I, *supra*, pp. 193 to 196.

All bids were rejected but Hamlin, Office Engineer of the Illinois Division of Highways, who testified on this subject did not know why.[26] Another letting was advertised

[26] (C) Tr. 11903.

to be held on June 5 but the invitations were recalled.[27] The Director of the Department of Public Works and Buildings of Illinois also wired all bidders offering to buy at a delivered price that would net them $1.10 a barrel but all bidders refused the offer.[28]

Fellows, Alpha Sales Manager, was asked why Alpha refused the offer and said:

> "Well, we figured that we had quoted the lowest price we wanted to quote consistent with the business conditions prevailing at that time in view of the anticipated costs, and so forth. We figure that we had quoted the lowest price that we wanted to quote.
>
> • • •
>
> We replied to that offer stating that we had quoted the lowest prices that we cared to quote on the State business, a million barrels from a State. We would have had some trouble taking care of our commercial business, and we wanted to take care of the commercial business also.
>
> • • •
>
> The State couldn't have bought all the cement that they wanted from us. They were calling, as I recall it, for somewhere around 3,000,000 barrels.
>
> • • •
>
> And they offered us a million, and that together with our commercial business was more than we could handle. We wanted to take good care of our commercial business, and we felt that we had quoted the State the lowest price that we could in consideration of the anticipated increase in costs, and so forth." (Tr. 25894, 25897-98)

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[27] Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11907-08.

[28] Id., Tr. 11909-10; Com. Ex. 1896: Telegram dated May 31, 1933, Kingery to Universal Atlas making offer.
Com. Ex. 1897: Telegram dated May 31, 1933, Universal Atlas declining offer.
Com. Ex. 1129 L: Telegram dated May 29, 1933, Kingery to Lone Star making offer.
Com. Ex. 1129 M: Telegram dated May 31, 1933, Lone Star to Kingery declining offer.

After this the Illinois legislature passed an Act permitting the State to negotiate a contract and Marquette negotiated a contract with the State at a price lower than any price bid by any company at that letting.[29]

Since 1934 Illinois has not bought cement direct from manufacturers for highway construction but has specified that the contractors shall furnish it but Illinois still buys direct a small amount of its own work.[30]

b. Indiana

In its invitations for the years 1929 and for the first invitation for 1933, Indiana invited bids at one named destination in each of the ninety counties in the state. These invitations and bids in response thereto are included in section 4 above.

In its invitations for the years 1930, 1931, 1932 (two invitations) and the second invitation for 1933 Indiana used a form of invitation calling for bids f.o.b. cars at one named destination in each county of the State and also f.o.b. trucks of the Indiana Commission or its contractors at the bidder's mill. The language of these invitations is as follows:

"ITEMIZED PROPOSAL

Destination	County	Price per Barrel Delivered Including Cloth Sacks & Freight

• • •

The Cement Company also agrees that it will deliver cement in accordance with its proposal f.o.b. trucks of the Commission or its contractors at its mills located at

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[29] Wecker, President, Marquette (C) Tr. 14025-27.
Colburn, Vice President, Marquette (R) Tr. 39951, 40013.

[30] Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11825-26.

..... for ..... per barrel including cloth sacks."[1]

In evidence are invitations of this type for the above years inviting bids for a total of 9,150,000 barrels of cement. This figure is in excess of the cement requirements of the state because, as shown in the detail that follows, in 1932 bids in response to an invitation for 2,000,000 barrels were rejected and readvertised for the same amount. This apparent duplication is included in the Chart #IV-A because it was an invitation in response to which bids were submitted.

1930

Bids on 2,000,000 barrels for highway use in 1930 were invited at 90 destinations and f.o.b. trucks at bidder's mill. Fifteen companies bid for amounts ranging from 100,000 barrels to the maximum of 2,000,000 and at destinations ranging from thirty to the total of ninety (seven bid at ninety). Six out of the fifteen bidders also submitted bids f.o.b. trucks at their mills. Five of these have mills in Indiana and one in nearby Osborn, Ohio.[2] Executives of Hermitage and Alpha testified that they did not bid f.o.b. trucks at their mills because their mills were too far away from Indiana points for truck delivery.[3]

1931

Bids on 1,750,000 barrels for highway use in 1931 were invited at ninety destinations and f.o.b. trucks at bidder's

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[1] Resp. Ex. 1054 J, M: Indiana 1931 invitation.

[2] Com. Ex. 1876; Resp. Ex. 1053 A-B, H-M.

Lehigh	Southwestern
Lone Star	Universal Atlas
Louisville	Wabash

[3] McGovern, Sales Manager, Hermitage (R) Tr. 36283-85.
Fellows, Sales Manager, Alpha (R) Tr. 25715-17.
Resp. Ex. 1053 G. Alpha's bid.

mill. Fifteen companies bid for amounts ranging from 200,000 barrels to the maximum of 1,750,000 and at destinations ranging from 13 to the total of 90 (6 bid at 90). 7 of the 15 bidders also submitted bids f.o.b. trucks at their mills. Lehigh, Lone Star, Louisville, Universal Atlas and Wabash with mills in Indiana bid f.o.b. mill for trucks as well as Kosmos and Consolidated with mills in nearby Kosmosdale, Kentucky and Cement City, Michigan.[4]

Seven companies submitted revised bids after the opening to meet the lowest prices bid.[5]

1932

DECEMBER 17, 1931: Bids on 2,000,000 barrels for highway use in 1932 were invited at 90 destinations and f.o.b. trucks at bidder's mill. 17 companies bid for amounts ranging from 100,000 barrels to the maximum of 2,000,000 and at destinations ranging from 8 to the total of 90 (9 bid at 90). 9 of the 17 bidders also submitted bids f.o.b. mill. Lehigh, Lone Star, Louisville, Universal Atlas and Wabash with mills in Indiana, Consolidated and Wolverine with mills in southern Michigan, Standard and Pittsburgh with mills in Ohio.[6]

All bids were rejected.[7]

JANUARY 21, 1932: Readvertisement for bids on 2,000,000 barrels for 1932. 17 companies again bid, this time for amounts ranging from 150,000 barrels to the maximum of 2,000,000 and at destinations ranging from 7

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[4] Com. Ex. 1875 A-B; Resp. Ex. 1054 A-B, H, M: Invitation to bid.
Foley, Auditor, Purchasing Dept., Indiana State H'way Comm. (C) Tr. 11786.

[5] Com. Ex. 1875 B; Id., Tr. 11783-85.

[6] Com. Ex. 1864.

[7] Foley, *supra* (C) Tr. 11780.

to the total of 90 (7 bid at 90). This time 8 companies (with two bidding at two mills) bid f.o.b. mill.[8]

Awards were made to four of the five companies having mills in Indiana and to two others as follows:

Lehigh, Mitchell, Ind.	475,000
Lone Star, Limedale, Ind.	500,000
Louisville, Speed, Ind.	425,000
Wabash, Stroh, Ind.	175,000
Kosmos, Kosmosdale, Ky.	25,000
Marquette, Mo. & Ill. mills	200,000
	1,800,000

Awards were made on delivered prices.[9]

After bids were received the State permitted some companies with plants in Indiana to file revised bids to meet the lowest bids that had been made, that is, to equalize their bids with those of other bidders. This brought about identity of bids and awards were made to companies that had thus equalized their bids. One consideration in this procedure may have been to favor Indiana mills.[10]

1933

Bids on 1,400,000 barrels were invited f.o.b. named destinations only and the bids received on December 22, 1932 were all rejected. This invitation and bids are shown in the chart as f.o.b. destination.

The State readvertised for the same amount at the same 90 destinations but this time requested prices in bulk to-

[8] Com. Ex. 1863; Resp. Exs. 51-57, 59: f.o.b. mill bids of Standard, Lehigh, Universal Atlas, Consolidated, Wolverine, Wabash, Louisville and Lone Star. In each bid see p. 11.

[9] Foley, Auditor, Purchasing Dept., Indiana State H'way Comm. (C) Tr. 11799-800.

[10] Id., Tr. 11807-10.

gether with the request for an f.o.b. truck price at bidder's mill in case cement was ordered in cloth or paper sacks.[11] 17 companies bid delivered prices in bulk for amounts ranging from 50,000 barrels to the maximum of 1,400,000 and at destinations ranging from 20 to the maximum of 90 (8 bid at 90). No companies bid f.o.b. mill prices.[12]

Awards on these bids were made to four Indiana mills and one Michigan mill, as follows:

Aetna, Bay City, Mich.	120,000
Louisville, Speed, Ind.	120,000
Universal Atlas, Buffington, Ind.	120,000
Lehigh, Mitchell, Ind.	120,000
Lone Star, Limedale, Ind.	120,000
	600,000[13]

Foley, Auditor in the Purchasing Department of the Indiana State Highway Division, testified that since the last invitation and bids for 1933, above, Indiana has not bought cement direct from mills but on construction work it is bought by the contractor and on maintenance work it is bought in small quantities from dealers.[14] The legislature in 1933 enacted a new highway commission law and the new policy was adopted shortly thereafter in the discretion of the Commission.[15] Foley also testified that the State considered it best to pay the delivered price,[16] and there is no evidence that it ever asked any of the bidders to deliver f.o.b. trucks at bidder's mill pursuant to bids of that kind.

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[11] Com. Ex. 1859 A-B, E, L-O.

[12] Com. Ex. 1857.

[13] Com. Ex. 1858: Extracts from Minutes of Highway Commission.

[14] (C) Tr. 11736-37.

[15] Id., Tr. 11796-97, 11810, 11812.

[16] Id., Tr. 11801.

6. North Carolina; "Base Market Price" Invitations: Awards F.O.B. Destinations

North Carolina's forms of invitation in evidence call for bids at a selected list of price base mills and stated that the delivered prices will be the "base market prices" bid plus freight to destination.

Invitations in evidence for bids to be opened on February 27, 1936 and February 11, 1937 read as follows:[1]

> "Sealed bids, subject to the conditions on the reverse hereof, will be received at this office until 10 o'clock a.m. Feb. 27, 1936 and then publicly opened, for furnishing the supplies, materials, and/or services, as described below, delivered F.O.B. various destinations throughout North Carolina.
>
> • • •
>
> PRICES: The prices per standard barrel of cement including package delivered f.o.b. the destinations, on the various projects, will be the base market prices bid by you on February 27, 1936, plus the freight from basing point to destination.
>
> • • •

BASE PRICES BID FEBRUARY 27, 1936

Birmingham, Ala.	$.....Per Bbl.
Cape Girardeau, Mo.	$.....Per Bbl.
Charleston, S. C.	$.....Per Bbl.
Clinchfield, Ga.	$.....Per Bbl.
Fordwick, Va.	$.....Per Bbl.
Ironton, Ohio	$.....Per Bbl.
Kosmosdale, Ky.	$.....Per Bbl.

[1] Com. Ex. 3083 M; Com. Ex. 3062 U is identical except for the date.

Limedale, Ohio	$.....	Per Bbl.
Leeds, Ala.	$.....	Per Bbl.
N. Hampton Dist.	$.....	Per Bbl.
Mitchell, Ind.	$.....	Per Bbl.
Norfolk, Va.	$.....	Per Bbl.
Richatd City, Tenn.	$.....	Per Bbl.
Union Bridge, Md.	$.....	Per Bbl.
Wilmington, N. C	$.....	Per Bbl.
York, Pa.	$.....	Per Bbl."

Betts, Purchasing Agent of the North Carolina Highway Department, testified that this type of invitation was used for two or three years prior to the February, 1936 invitation. Starting in 1939 the state has issued invitations naming destination points only.[2]

As to the North Carolina method of buying cement, he testified:

> "A. We call for bids on a delivered price basis and cement is delivered freight prepaid to destination throughout North Carolina.
>
> Q. How many delivery points do you have bids submitted on? A. Well, I guess there are possibly a thousand delivery points in North Carolina and they are filed on railroad stations, and the various cement companies bid on a large number of them, and even delivered prices for various points throughout the State, and they pick, oh, I would say very nearly every point in North Carolina and quote at each point the delivered price.
>
> • • •
>
> • • • We formerly called for bids at the basing points and we did receive bids just at the basing points, but in recent years the cement companies

[2] (C) Tr. 20221-22, 20231-34.

changed to making the bids to delivered points rather than on a basing point basis.

Q. When did that change take place? A. Prior to 1934. • • •

• • •

Q. When you refer to former bids on a basing point basis, do you mean bidding f.o.b. mill or what? A. We just asked the cement companies to bid at how much they would furnish cement at the various mills and basing points that would affect North Carolina." (Tr. 372-73)

Further:

"Q. And in getting the mill prices did you think you were getting a basing point price also? A. Yes. We had to establish some basis on which to buy cement, and that was the simplest way, instead of having all these thousand points throughout the State of North Carolina we would just have six or eight. We try to simplify this thing, you know.

Examiner Norwood: Do you try to get them to sell you f.o.b. mill?

The Witness: No, we do not buy f.o.b. mill. We ask them to give us delivered prices, freight to be prepaid. That is the basis on which we buy cement, but in asking them to bid, in these requests for bids we asked them to prepay the freight, which they do for us in all instances." (Tr. 386)

As to the 1936 and 1937 invitations above, he testified:

"A. Prior to this year we did not include in our requests for bids destinations other than basing points.

By Mr. Wooden:

Q. What do you mean by basing points? A. The price of cement f.o.b. the mill is a basing point." (Tr. 20232)

Further:

"Q. You mean, Mr. Betts, that prior to 1939 it was the custom of your department to request and

receive bids f.o.b. mill, and to buy cement on that basis? A. No, we didn't buy cement on that basis." (Tr. 20233)

The witness then read the form of invitation and continued:

"Q. That is a matter of what we might call a destination cost? A. That is the basis on which we call for cement under date of February 27, 1936." (Tr. 20233-34)

1932

In evidence are three contracts between the State and Universal Atlas, Lehigh and National each for 200,000 barrels and dated February 9, March 5 and March 4, 1932 respectively.[3] These were furnished by Betts, Purchasing Agent of the North Carolina State Highway Commission, in support of his testimony that prior to 1934 various companies filled in the base market prices at fifteen points, as requested in the invitations of this type.[4]

1936

Invitations of the above type were issued on February 15, 1936 for 400,000 barrels for delivery between March 1, 1936 and March 1, 1938 with destinations to be furnished on or before March 1, 1937.[5] A tabulation of bids lists 147 destinations and shows that 16 companies bid at destinations ranging from 1 to 70 (16 bid at 70). Destination prices were bid at these points and no bids were submitted in response to the request for "base market prices" at the 16 points listed in the invitation.[6]

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[3] Com. Ex. 16 A-C.

[4] (C) Tr. 494, 373, 390.

[5] Com. Ex. 11; Resp. Ex. 3083 M.

[6] Com. Ex. 11 A-B.

Awards were made as follows:

Company	No. of Destinations Bid	Award	Citation — Com. Ex.
Alpha	82	50,000	3082 I-M, E
Cumberland	115	none	3091 A-D
Hermitage	115	none	3089 A, D-F
Lehigh	111	50,000	3080 D, I-K
Lone Star	93	50,000	3083 J-R, B
Medusa	95	50,000	3078 R-T, C
National	218	50,000	3077 P-V, J
National Portland	83	none	3086 D-E
North American	100	none	3085 A, F
Penn-Dixie	113	50,000	3092 L-U, G
Signal Mt.	112	50,000	3084 X, Z, BB, DD, FF, HH, JJ, D
Southern States	118	none	3090 A-H
Standard Lime	99	none	3087 E-I
Superior	113	none	3088 A, B-G
Universal Atlas	96	50,000	3081 O, Q, S, U, B
Volunteer	91	50,000	3079 F-H, D
		450,000	

1937

Invitations of the same type were issued on February 4, 1937 for 500,000 barrels for delivery between March 1, 1937 and March 1, 1939 with destinations to be furnished on or before March 1, 1938.[7] A tabulation of bids received shows that 15 companies bid at destinations ranging from 81 to 219 (1 bid at 219).

[7] Com. Exs. 12, 3075 P.

Awards were made as follows:

Company	No. of Destinations Bid	Award	Citation: Com. Ex.
Alpha	83	50,000	3069 B-H, BB-EE
Cumberland	115	50,000	3070 I-N
Hermitage	113	none	3074 A-F
Lehigh	111	50,000	3075 K, M-O, S-T
Lone Star	93	50,000	3071 N, T-BB
Medusa	95 and "base market prices"	50,000	3062 I, R-S, Y-Z
National	219	50,000	3063 R-S, Z-CC
North American	100	50,000	3068 K, O-R
Penn-Dixie	113	50,000	3067 I-K, R-AA
Signal Mt.	112	50,000	3072 H-I, K-M, O, Q, S, U, W
Southern States	113	50,000	3066 F, N-R
Standard Lime & Stone	81	none	3077 A, F-G
Superior	113	none	3073 E-I
Universal Atlas	96	50,000	3065 G, Q, S, U, W, Y
Volunteer	91	50,000	3064 J, L, P
		600,000	

In making awards, Betts, Purchasing Agent, testified as follows:

"Q. What has been the policy followed by you in making awards to companies when they submit these identical delivered prices? A. Well, there have been in the past years of from eight to twelve companies who could satisfactorily serve North Carolina, and we have been more or less dividing the business between those companies.

Q. On what basis was the division made? A. Well, we make a contract, say, for 50,000 barrels of cement with each company, and as we build roads we award certain projects to various cement companies and we try to give those projects to those cement companies located nearest the projects. We do that in an effort to cooperate with the cement companies as well as the contractors, so that they will get the

greatest net back to the mill. We believe in the long run we have got to pay the bill. If we can help the cement companies get the greatest net why, some day, they might reduce the price.

And then again the contractor always wants cement from the nearest mill in order to obtain the best service. In other words, if the contractor is building a project and he is using two cars of cement a day, if he is getting his cement from a mill that takes five days in transit and it starts to rain he has got ten cars of cement on the road, and that is a lot of cement. If he is located close to a mill that is, oh, I would say one day away, and he is using two cars of cement a day and it starts to rain and rains for two weeks he hasn't got but two cars of cement on his hands." (Tr. 381-82)

The foregoing policy is based upon witnesses' experience in finding that the delivered prices bid are identical.[8]

B. Land Grant Freight Rates.

1. History and Explanation

Land grant rates are reduced freight rates to the Federal Government which apply over railroads which received Government aid in the form of land grants. Under the terms of the land grant it was provided that Government freight should be moved at a certain percentage of the established commercial freight rate, sometimes 100% and sometimes less, such as 50%. The rates arise out of a contract between the carrier and the Government.[1]

Oliver, Vice President of the Southern Railway, testified as follows with respect to the nature and history of land grant freight rates:

"Q. Well, Mr. Oliver, will you just, following that line of inquiry, will you tell us what the facts were as to the relationship between the Government

[8] Betts, Purchasing Agent, N. C. State H'way Dept. (C) Tr. 383.

[1] Oliver, Vice President, Southern Railway (R) Tr. 47772-73.
Partridge, Sales Manager, Southwestern (C) Tr. 8965.
Rice, Attorney, U. S. War Dept. (C) Tr. 1730-31.

and the railroads in connection with these land grants? A. Well, in the beginning the railroads were aided in their construction effort by these land grants. The country had to be developed, and this was one way of undertaking that development.

Q. By that you mean that the Government gave some grant or right over a portion of land to the railroads; is that correct? A. To encourage the construction of the railroad.

Trial Examiner Norwood: Did the railroad get title to the land?

The Witness: No, the railroads were not entitled to the land, your Honor.

Trial Examiner Norwood: Given the title,—they conveyed the land to the railroad?

The Witness: Oh, yes, the title was conveyed to the railroad, and the railroad, in turn, used that aid in its construction. Then the next step was the development of the territory. The railroads undertook to bring in settlers and sell this land off to them; in many instances at very nominal prices per acre. The whole theory being to get the territory settled up so it would support the railroad.

By Mr. Werle:

Q. In return for the grant of land the railroad agreed with the Government to give it certain privileges in connection with hauls over that land; is that it? A. I don't think the railroad agreed, Mr. Werle. I think it was fixed on the railroad by statute, and I think it came after the railroads were built.

Q. I see. A. After the railroads were aided and after they were constructed, then the Congress, by statute, said that these land-granted roads were to be used as highways for military impedimenta, troops, and so forth, and the original law would have required, and I believe it did require, the railroads to transport such impedimenta free. Then the Government, or then the Congress recognized that that was not fair, and they allowed the railroads a certain percentage of the rate, the division of the rate, for performing this service, this percentage usually representing, according to my calculations, about the cost of handling the traffic. In other words, the Government retained the right to use these land-granted

railroads as a military highway, so to speak, and then they paid the railroads certain amounts for performing the service of handling troops, impedimenta, and Government supplies. Now, of course, the activities of the Government increased as time went on, and the Government began to handle traffic which was never in original contemplation.[2]

• • •

Q. As to these statutes which fixed the conditions regarding land-grant rates over your road, they also made the grant of the land itself; did they not? A. No; I don't think so. The statutes came later. The land was——

Q. You mean the land was granted first. A. Oh, the land was granted away back yonder, and the statutes came later. I am speaking now generally. I do not recall the date that these lands were granted to these two parts of our system, but I am quite clear that the statute fixing the land-grant discounts came after the land grants were themselves authorized.[3]

• • •

Q. Were not the conditions in reference to land-grant aided roads requiring some of them to haul Government-owned property or Government troops and impedimenta, as you call it, a part of the statute which made the land grant itself? A. It was certainly in the statute, but I don't think the land grant itself, the individual land grant, was in the same statute. That was something different.

Q. Are you speaking now of the Southern Railway when you say that? A. Yes.

Q. Or are you speaking more broadly? A. I am speaking particularly with respect to the Southern Railway System. Now, my recollection is that these land grants were authorized, and then the Government discounts on Government traffic were covered by a separate statute enacted by Congress.

Q. But the making of those special rates was provided for in the original grant, was it not? A. In the original statute?

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[2] (R) Tr. 47785-87.

[3] (R) Tr. 47788.

Q. That is what I mean—making the grant? A. Well, I won't be sure about that.

Q. You do not know as to that, then; is that it? A. No; I don't know that the statute required us to make these deductions at the time the land was granted to us. Of course, the statute is a general statute; it applies all over the country."[4]

Inasmuch as there was a contract between the railroad and the Government, the railroad had equal access to the facts as to the pertinent land grant rate.[5]

Land grant freight rates are to be distinguished from special freight rates which consist of a slight reduction over commercial freight rates granted to the Government where land grant rates are not effective. Thus Rice, Attorney in the War Department, testified:

"Q. And is the commercial rate ever lower than the land grant or the special rate? A. No, I do not see how you could have the commercial rate the lowest.

• • •

Q. Do you know anything about how special rates compare with land grant rates, whether they are lower or higher than land grant rates? A. Those that I have particularly noticed have been higher than land grant rates. They attempt to give to the Government a slightly reduced freight rate over a line between the points over which land grant rates would not be in effect, but would be naturally not all commercial. Within my recollection, that is the way the specials run. They will quote a special rate over a certain haul which is in effect a reduction of the commercial rate, but I have never noticed one of them that came as low as a land grant rate."[6]

The same witness testified that it was his recollection that except for special rates to the Government all other special rates which were granted by the railroads in the nineteenth century, such as to individuals and corporations, had been cancelled by the Interstate Commerce Commis-

[4] (R) Tr. 47789-90.

[5] Partridge, Sales Manager, Southwestern (C) Tr. 8957.

[6] (C) Tr. 1786, 1787.

sion long before this. He said further that if he were a shipper not located on a land grant road he would think that he was not advantageously located.[7]

Hayghe, Chief of Traffic in the Treasury Procurement Division, testified that to the best of his knowledge there was no instance where the commercial freight rate was lower than the land grant rate.[8] He testified likewise that there had never been an instance where a special freight rate was higher than a commercial rate, although it was possible by means of an error.[9] Storey, President of Consolidated, testified to the same effect.[10]

The extent of the difference between the average commercial freight rate and the average land grant rate was illustrated by the witness McNair, State Procurement Officer for Mississippi, who testified that the commercial rate for various destinations in Mississippi from Birmingham, Alabama was 17¢ per cwt., whereas the land grant rate was 6¢ cheaper.[11] His testimony in this connection was based on an estimate by the Traffic Section of his office.[12]

Hayghe of the Procurement Division testified that changes in land grant rates may occur due to either changes in the land grant rate percentages or in divisions of the rates between railroads.[13] However, there is very little change in land grant rate percentages. A change in the commercial freight rate would also change the land grant rate, but the latter remains fairly constant.[14] Rice, Attorney in the War Department, testified that the only change in rate by the Secretary of War was in 1924 when the rate was fixed at 50% under a statute.[15] An executive of one

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[7] Rice, Attorney, U. S. War Department (C) Tr. 1729-30.

[8] (C) Tr. 21139.

[9] (C) Tr. 2462.

[10] (R) Tr. 47604.

[11] (C) Tr. 4943.

[12] (C) Tr. 4984.

[13] (C) Tr. 2459-61.

[14] Roberts, Traffic Manager, Volunteer (R) Tr. 31828-30.

[15] (C) Tr. 1811-17, 1774-75.

respondent testified that on one occasion his company was informed by the Southern Railway of a change in land grant rates between two points in Louisiana.[16] There is also evidence on one occasion in November 1932 the Government used a new set of land grant rates on a letting at Greenville, Mississippi.[17]

Changes in land grant rates can also occur due to changes in divisions between railroads.[18] A division is the proportion of a freight rate which each railway secures where a shipment passes over two or more lines.[19] An agreement can be made between the railroads that a smaller proportion of the total tariff will go to the land grant railroad. In this manner the railroads can lessen the advantage to the government without its consent and without changing the commercial rate.[20]

Generally speaking railroad divisions like land grant rates remain fairly constant and there has been little reconstruction of railroads or rearrangement of lines in the past ten years.[21]

2. Land Grant Territory

Land grant railroads and land grant rates occur only in limited areas of the country. Their extent is best illustrated by a map of land grant and bond aided railroads throughout the United States which appears on page 758. This map is revised to April 1, 1935 and is taken from a guide to the application of land grant laws and the computation of land grant rates prepared by the Federal Traffice Section of the Treasury Procurement Division issued on April 1, 1937.[1]

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[16] Postelle, Sales Manager, Alpha (R) Tr. 25302.

[17] Com. Ex. 190 E; cf. Tr. 1625.

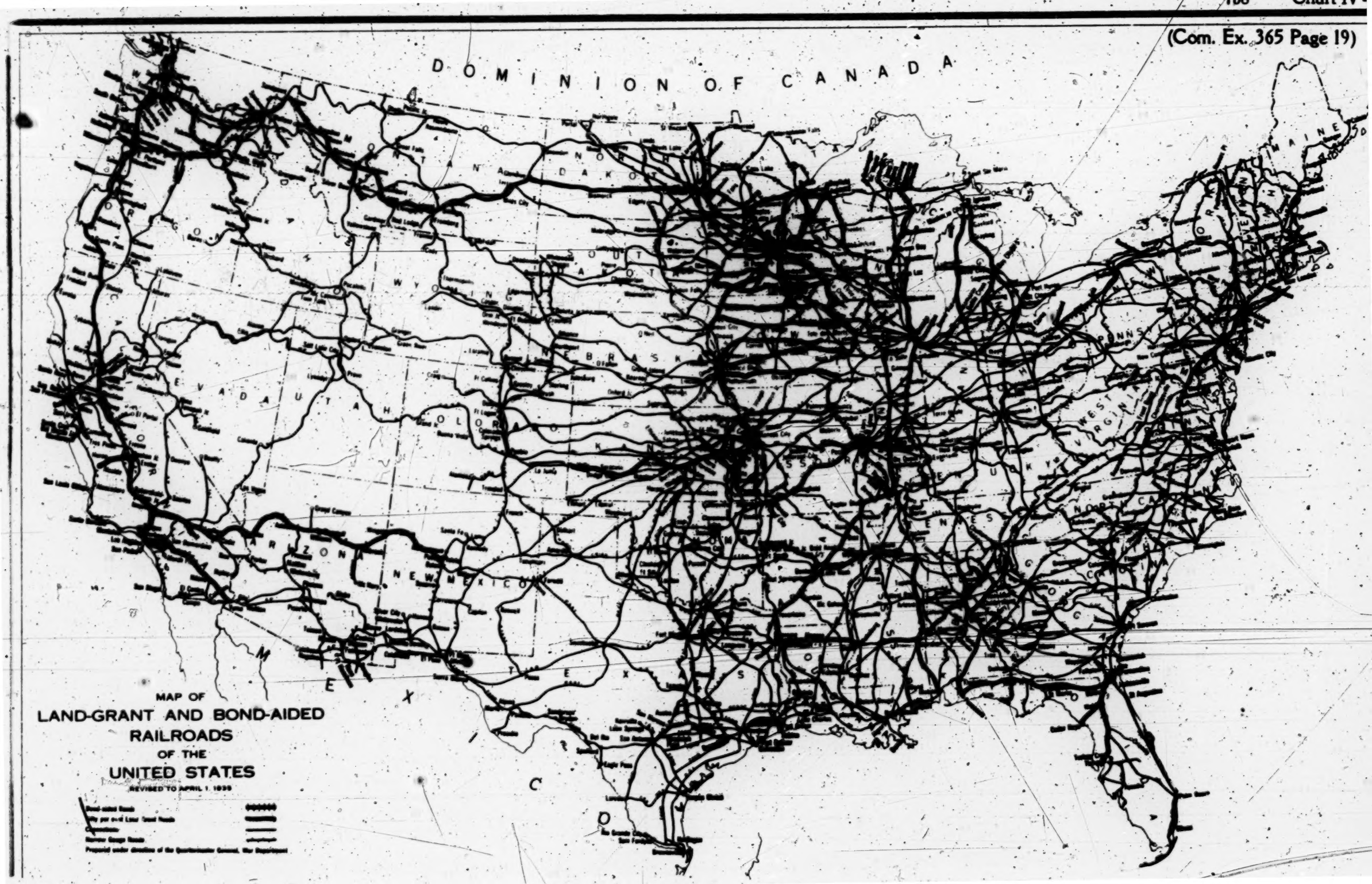
[18] Rice, Attorney, U. S. War Department (C) Tr. 1774-75, 1811-17.

[19] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38435-39.

[20] Rice, *supra*, Tr. 1811-17.

[21] Roberts, Traffic Manager, Volunteer (R) Tr. 31828-30.

[1] Com. Ex. 365.


DOMINION OF CANADA
MAP OF
LAND-GRANT AND BOND-AIDED
RAILROADS
OF THE
UNITED STATES
REVISED TO APRIL 1, 1939

As shown on the map, the land grant railroads are concentrated in the area eastward from the Mississippi River to a line running roughly from Lake Superior to Mobile, Alabama, with extensions eastward around the Great Lakes to Port Huron on Lake Erie and in the South throughout Alabama and in portions of Florida. West of the Mississippi there is an extension through the State of Kansas and another running through the States on our northern border; thence southerly in portions of California and easterly through Arizona to the center of New Mexico.

Hayghe testified as follows concerning the areas on which land grant rates are available:

> "* * * Land grant is not available generally east of the Indiana-Illinois state line, south of the southern boundary of Michigan and north of the Tennessee-Mississippi and Alabama state line, or north of the Georgia-South Carolina state line. That is explaining it somewhat crudely, I realize. There are no land grants available in the States of Texas, Arkansas, Oklahoma, nor in the States of Colorado, Utah and Nevada and Wyoming. It is therefore available in the balance of the country."[2]

He testified further that among the "excepted states" in which these rates are not available were the following: Connecticut, Delaware, Georgia, Maryland, Massachusetts, Indiana, Kentucky, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Vermont, Virginia, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia and Wyoming.[3]

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[2] Hayghe, Chief of Traffic, Procurement Division, U. S. Treasury Department (C) Tr. 2514.

[3] Id., Tr. 2514-16.

Other evidence in the record as to the extent of land grant territory in particular areas is footnoted.[4]

[4] Arizona and New Mexico—In Arizona most of the land grant rates are in the western and northern part of the state on the Santa Fe coast line. In New Mexico they are on the coast line and supply either west of Isleta or Dalies from El Paso (Blair, W. R. Sales Manager (El Paso), Southwestern (R) Tr. 39216-17).

West of Mississippi River—Generally speaking these rates are made from Minneapolis and St. Paul to Portland, Oregon, thence to Roosevelt Junction, California, and in the southern part of California from Goshen Junction and thence eastward across Arizona and New Mexico (Hayghe, *supra*, Tr. 21114). There are two land grant rate lines through Arkansas, the Santa Fe and M. K. Railroads. Shipments could be made from Oklahoma with land grant rates into Kansas, Arkansas or Missouri. There is very little land grant mileage in Kansas and none, generally speaking, in Texas (Blair, W. R., *supra*, Tr. 39087, 39095; Moore, Vice President, Dewey (R) Tr. 47025-26). There was conflicting testimony as to the availability of land grant rates in Oklahoma. Thompson, Sales Manager of Oklahoma and Arkansas, testified that none were available. In Louisiana land grants are available from Shreveport east on the old V.S. & P. Line ((R) Tr. 46530).

East of Mississippi River—There are very few land grant rates east of the Mississippi (Rice, Attorney, U. S. War Dept. (C) Tr. 1609). Florida is well served by land grant routes. There is one from Leeds and Ragland, Alabama into Florida (Harkness, Florida State Procurement Officer, Proc. Div., U. S. Treas. Dept. (C) Tr. 4916-17). With respect to Alabama, there is a route from Birmingham to Mississippi and there are 400 miles of such routes within the State (McNair, State Procurement Officer, Mississippi (C) T. 4985). Portions of the routes of the Southern Railway system are included in the State of Alabama (Oliver, Vice President, Southern Railway (R) Tr. 47771-73). Some routes run through Tennessee to a little extent (Rice, *supra*, Tr. 1609). Some of the mills which supply the State of Georgia are located on land grant routes (Harman, Georgia State Procurement Officer, Proc. Div., U. S. Treas. Dept. (C) Tr. 4777-78).

The following testimony of Thompson, Sales Manager of the respondents Oklahoma and Arkansas shows the limitations on land grant shipments from mills situated in land grant territories:

> "Q. Are there any land-grant rates from Ada or from O. K. Junction? A. There are certain destinations that we could ship from those mills that would move over a railroad that has land-grant deductions, yes.
>
> Q. And in what area would those points be located? A. Well, we could ship into Kansas and in Arkansas or Missouri, up and down the river, probably, to some places it would be land grant. As I recall, it is two lines of land-grant railroads through Arkansas, one kind of northeast and southwest and the other east and west, through the State and there is quite a little—not quite a little—there is very little land-grant mileage in Kansas, some on the Santa Fe and Katy, I believe. There is no land-grant mileage in Oklahoma or Texas, and I believe in Louisiana there is the V. S. & P., from Shreveport, the old V. S. & P. from Shreveport east on the land-grant mileage."[5]

The limitations on such shipments are further illustrated by the following testimony of R. W. Moore, Vice President of Dewey:

Custer, Senior Administration Assistant in the Bureau of Supplies and Accounts, Navy Department, testified that he knew of no land grant or special rates available to the government which might influence prices to eastern Navy yards other than rates for Pensacola. Thus he said that there are no land grant railroads in the vicinity of Boston, Brooklyn, Philadelphia, Annapolis, Washington, White Plains, Norfolk, Sawell Point, Charleston, New London, Newport, Lakehurst or Portsmouth ((C) Tr. 21391, 21257-64).

Similarly, land grant transportation was not involved in the purchase of cement by the TVA for the Norris and Wheeler Dams (Garity, Director of Purchases, TVA (C) Tr. 2637).

[5] (R) Tr. 46530.

"Q. Mr. Moore, is the Dewey Company's mill at Dewey, Oklahoma, situated on any land grant railroads? A. Yes, sir.

Q. What are they? A. The Atcheson, Topeka and Santa Fe Railway, and the Missouri, Kansas, and Texas Railroad.

Q. Is there any way that the Government can route shipments from your mill at Dewey, Oklahoma, so that the land grant rates are available over the whole journey to any destination? A. The Dewey Company's mill?

Q. Yes. A. No, sir. There is no way."[6]

The following testimony of Oliver, Vice President in Charge of Traffic of the Southern Railway, shows the limited extent to which his company's lines are land grant routes:

"Q. Are there portions of the lines of the Southern Railway System where the United States Government has been entitled to shipment by land-grant rates? A. Yes.

Q. Will you just explain for us briefly what these Government land-grant rates are?

* * * *

A. Well, the land-grant rates, your Honor, apply over those railroads which in the beginning were aided by the Federal Government through the grant of land over which the Federal Government has retained the right to transport its traffic, the rate for such transportation being fixed by statute.

Now, we have on the Southern Railway System two such instances, on our Alabama-Great Southern Railroad between the Alabama-Tennessee line, and the Alabama-Mississippi line, and on the Mobile Division between Jacksonville, Ala., and Selma, Ala. Of course, there are other land-grant roads in Southern territory on which the Government is entitled as a matter of law to land-grant discounts."[7]

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[6] (R.) Tr. 47025-26.

[7] (R.) Tr. 47772-73.

a. Respondents to Whom Land-Grant Freight Rates Are Not Available

Executives of the following respondents testified that they made no shipments involving land grant rates, never solicited business in land grant territory and had no occasion to ship into such territory.[1]

Bessemer	North American
Edison	Peerless
Federal	Pittsburgh
Green Bag, West Va.	Southwestern (Osborn Mill)
Hercules	West Penn
Keystone	Whitehall
Lawrence	Wolverine
Nazareth	

In addition to the foregoing, executives of five other respondents testified to the effect that they had very little contact with land grant rates:

Thus Hoenig of Nebraska testified that his company had very little use for such rates and that the Fort Riley lettings by the Army provided the only occasion for their use.[2]

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[1] Bessemer: Warren, F. B., Vice President (R) Tr. 32173-74.
Edison: Sweeney, Vice President (R) Tr. 35798.
Federal: Bates, J. E., Sales Manager (R) Tr. 30625.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29585.
Hercules: Brobston, President (R) Tr. 26174.
Keystone: Scott, H. M., President (R) Tr. 27483-85.
Lawrence: Ackerman, Sales Manager (C) Tr. 7290.
Nazareth: Robeson, Vice President (R) Tr. 28047, (C) Tr. 3881-84.
North American: Porter, President (R) Tr. 33984.
Peerless: Russell, Vice President (R) Tr. 34325.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37887, 37926, 38030.
Southwestern (Osborn Mill): Warren, G. E., Vice President (R) Tr. 28971.
West Penn: McKee, Vice President (R) Tr. 27750.
Whitehall: Elliott, Vice President (R) Tr. 28529.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35913.

[2] Hoenig, Sales Manager, Nebraska (R) Tr. 42123.

Petoskey has some contact with such rates but little use for them.[3]

Hawkeye used land grant rates only on the Fort Peck letting.[4]

None of the bids handled by the Easton office of Alpha involved such rates, with the exception of Navy yard requirement bids at Pensacola, Fla.[5]

Huron has infrequent contact with land grant rates.[6]

3. Sources of Land Grant Rate Information

There are three general sources of such information, namely (1) the railroads, (2) tabulations and abstracts of prior government lettings involving such rates and (3) government circulars or other publications.[1]

Counsel for the Commission, on one occasion, stated on the record that the Commission's own evidence showed "right on the face * * * that the sources of their information were * * * the Government and * * * the railroads." (Tr. 39017-18)

Browder, Traffic Manager, Penn-Dixie, testified:

> "Q. How do you obtain those rates? A. Why, we obtain them in several different ways. We have had invitations to bid from the Government that contained the land-grant rates; we have secured them from the tabulation of Government bids on previous lettings, and we have secured them from the railroads, and upon occasions we have figured them ourselves."[2]

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[3] Lucas, Vice President, Petoskey (R) Tr. 38764.

[4] Manley, General Manager, Hawkeye (R) Tr. 41897-98.

[5] Coogan, Vice President, Alpha (R) Tr. 24039-40.

[6] Meyers, Traffic Manager, Huron (R) Tr. 33563-64.

[1] Reiter, Vice President, Universal Atlas (C) Tr. 3712-21.

[2] (R) Tr. 38435.

Oliver, Vice President of Southern Railway, testified that there is nothing secret about land grant rates and that the railroads cooperate fully in furnishing such rates to shippers. His testimony follows:

"Q. And does the Southern Railroad have the information—that is to say, so they can tell what this deduction or discount is? A. Yes, we have that information in two ways: We have it from our records, from our own tariffs, and our own percentage and division sheets. We have it compiled over a period of years from our experience in the handling of this traffic, and then we also have it from another source, namely, a publication by the War Department. Now, this publication by the War Department is undoubtedly a compilation of experiences under the operation of the land-grant laws.

Q. Is there any secret about these land-grant deductions between the Southern Railway and the United States Government, or have they made that information available? A. Oh, no, there is no secret at all about it. It is available not only from our own records but it is available from a public document published by the War Department to which I can give you reference if you would like to have it.

Q. And you are referring, are you, Mr. Oliver, to a circular entitled 'Land Grant Percentages,' published by the office of the Quartermaster General of the War Department; is that correct? A. That is correct.

* * * *

By Mr. Werle:

Q. Now, Mr. Oliver, can you tell us of your own knowledge whether or not the Southern Railway receives requests from shippers of various commodities and industrial goods for land-grant rates applying between given points? A. Oh, yes, we received such requests.

Q. And have you received such requests from shippers of cement? A. Yes, I think perhaps we have received more requests from shippers of cement than any other one commodity.

Q. And have any such requests come to your attention personally? A. Oh, yes.

Q. Has the Southern Railway had any practice as to whether or not it would furnish land-grant information on request to shippers? A. Well, we furnish such information to shippers to the best of our ability. We always like to accommodate the patrons of our railroad, and we haven't hesitated to give shippers the benefit of our knowledge respecting these land-grant rates, these land-grant deductions or discounts, whichever you may want to call them.

Q. And for how long a period has the Southern Railway done that? A. Well, I can testify to a period of 16 years since I have been in charge of the Southern Railway's traffic department.

Q. Does it make any difference in your ability to furnish this information if either the shipping point or the ultimate destination, or both, are not points on the lines of the Southern Railway? A. No, it does not.

Q. And has the Southern Railway furnished information in such cases as that from time to time? A. Yes. I recall not so very long ago we furnished one of our shippers with information respecting land grants on reinforcing steel bars to the Boulder Dam, for example, away out in the West. That information was necessary to enable him to bid on that contract.

* * *

Q. Now, Mr. Oliver, when more than one shipper or where several shippers of cement request land-grant information from the Southern Railway between two points, do you give each of them the same information or do you give each of them different information? A. Oh, we give them the same information, of course.

Q. Taken from the records which your railroad keeps; is that correct? A. That is correct."[3]

a. Railroads

Ten Respondents moved to adduce additional evidence showing they had obtained land grant rate information

[3] (R) Tr. 47774-78.

from the railroads. (Motion, Subject X, pp. 41-42.) In it was conceded "that the railroads were the principal original source of Petitioners' information." (Answer, pp. 7-8.) Respondents have accepted this concession. (Reply to Commission's Answer, p. 12.)

Executives of the following respondents testified that they obtained information as to land grant rates from the railroads.

Alpha	Missouri
Arkansas	Monarch
Consolidated	Nebraska
Dewey	Oklahoma
Florida	Penn-Dixie
Hawkeye	Signal Mountain
Hermitage	Southern States
Huron	Southwestern (El Paso)
Lehigh	Trinity
Lone Star	Universal Atlas
	Volunteer

Documentary proof in the record shows that the following were among the railroads which provided such information.

Atcheson, Topeka & Santa Fe Railway
Chicago, Milwaukee, St. Paul & Pacific Railroad
Minneapolis & St. Louis Railroad
Central of Georgia Railway Co.
Southern Railway
Missouri Pacific Lines
Louisville & Nashville Railroad Co.
Illinois Central Railway
Great Northern
Seaboard Airline

Union Pacific
St. Louis—San Francisco System[1]

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[1] Alpha: Coogan, Vice President (R) Tr. 24195-97.
Fellows, Sales Manager (R) Tr. 25784-85, 25803-05.
Postelle, Sales Manager (R) Tr. 25041-42, 25167-69, 25382, 25430-32, 25450-51, 25480-82.

See Resp. Ex. 891: Office memorandum as to receipt of land grant rate from Southern Railway.

Arkansas, Oklahoma: Thompson, Sales Manager (R) Tr. 46534-35.

Dewey: Moore, R. W., Vice President (R) Tr. 47020-23, 47025-30, 47413-20.

See also telegram from R. W. Moore to Atcheson, Topeka & Santa Fe Railway, Resp. Ex. 3626 B and list of land grant rates effective from October 1, 1933, Resp. Ex. 3626. See Resp. Ex. 3624 B: Letter from Chicago, Milwaukee, St. Paul & Pacific Railroad setting forth land grant rates.

Florida, Trinity, Signal Mountain, Consolidated: Storey, Vice President (R) Tr. 47597-99, 47602-04.

Hawkeye: Manley, General Manager (R) Tr. 41768, 41770-71.

Cf. Resp. Ex. 3398: Letter from Minneapolis & St. Louis Railroad to Hawkeye setting forth land grant rates.

Hermitage: McGovern, Sales Manager (R) Tr. 36324-26, 36349-54.

Huron: Meyers, Traffic Manager (R) Tr. 33307-09, 33563-64.

Lehigh: Bowen, Vice President (R) Tr. 27040-43 and see Resp. Exs. 1320 to 1347, inclusive, being correspondence, telegrams and office memoranda relative to the receipt of land grant rates from the following railroads: Central of Georgia Railway Co., Southern Railway, Atcheson, Topeka & Santa Fe, Minneapolis & St. Louis, Chicago, Milwaukee, St. Paul & Pacific, Missouri Pacific Lines, Great Northern Seaboard Airline, Union Pacific, St. Louis-San Francisco System.

Lone Star: Koch, Vice President (R) Tr. 32722-24.
Neylan, Asst. General Sales Manager (C) Tr. 6646-47.

Missouri: Alexander, President (R) Tr. 37128-29.

Monarch: Brooke, Vice President (R) Tr. 42335-36.

Nebraska: Hoenig, Sales Manager (R) Tr. 42055, 42121-23.

Penn-Dixie: Browder, Traffic Manager (R) Tr. 38435-39, 38503-04.

Several of these witnesses testified that the rates which they thus obtained included not only rates on routes from their own mills but also from mills of the competitors, including basing point mills. Thus, R. W. Moore, Vice President of Dewey, testified:

> "Q. Mr. Moore, in obtaining this information from railroads regarding land grant rates, I wish you would tell us in what form you obtained that information, whether you obtained it by mills, or by destinations or how? A. Well, I obtained it from cement producing points to destination points, either by means of telephone, telegraph, or mail.
>
> Q. Well, did the railroads provide you with any or have they provided you with any tabulations or land grant rates? A. Yes, sir.
>
> Q. Do those tabulations show or contain rates from mills other than your own? A. Yes, sir."[2]

Southern States: Elcock, Vice President (R) Tr. 37583-85, 37616-17, 37645-46, 37660-61.

Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 39215-17, 39363-64.

Universal Atlas: Reiter, Vice President (C) Tr. 4532.
Sutherland, Asst. to Vice President (R) Tr. 35537-38.

Volunteer: Roberts, Traffic Manager (R) Tr. 31828, 31830-46, 31894-95, 31899, 31901-02, 39104-05, 31962-69 naming the following railways which provide land grant rates (1) Louisville & Nashville, (2) Southern, (3) Illinois Central, (4) Central of Georgia.

And see Resp. Exs. 2284, 2286, 2255 which are pencil notations made by Volunteer of land grant rates received from these railroads.

Tr. 31792-95, 31808-10, 31820-21, 31826-27.

And see Resp. Exs. 2246, 2247, 2251 and 2254 being correspondence with Southern Railway and Louisville & Nashville Railroad Co. and office memoranda relative to the receipt of land grant rates from said railroads and others.

[2] (R) Tr. 47027-28.

Elcock, Vice President of Southern States, testified to the same effect.[3]

Relative to the cooperation which manufacturers received from all the railroads in obtaining this information Brooke, Vice President of Monarch, testified as follows:

> "Q. Mr. Brooke, does the Monarch Cement Company make inquiries of railroads regarding the land-grant rates? A. We do.
>
> Q. How long has that been your practice? A. Oh, ever since we have been using them.
>
> Q. Does your answer apply to all of the railroads that serve your territory on which land-grant rates apply? A. Yes. We secure rates from all of them.
>
> Q. What has been your experience,—have the railroads or have they not cooperated with you in furnishing land-grant rate information? A. They have freely cooperated."[4]

Likewise Coogan of Alpha testified that the railroads "have no hesitation whatever in giving us all the information that they can."[5]

b. Testimony of Government Officials as to the Availability of Land Grant Information Through Railroads

Among the government officials called as witnesses by the Commission who testified that such information was available to any shipper as well as to the government were the following:

Taylor, Assistant Chief of the Engineering Division, U. S. Bureau of Reclamation, who testified as follows:

> "The Witness: With regard to the land grant rates?

[3] (R) Tr. 37616-18, 37645-46.

[4] (R) Tr. 42335-36.

[5] (R) Tr. 24196.

Examiner Norwood: Yes. Do they have the complete data, the same that you have?

* * * *

The Witness: The data available is published, percentages applying to freight rates existing on certain railroads, and anyone can figure from those percentages the Government land grant rates.

Examiner Norwood: Do the shippers have that data?

The Witness: Anybody can get that information.

Examiner Norwood: Do they have the same information that you have?

The Witness: It is available, as I understand it, to everybody."[1]

Hayghe, Chief of Traffic in the Procurement Division of the Treasury Department, testified as follows:

"Q. Well, you know of no reason other than the one of practicability why railroads should not give out information about land grant rates freely, do you? A. Why they shouldn't give it out?

Q. Other than practicability, the same one that bothers you. A. Well, the railroads do make an effort to give out land grant rates. We have discouraged it. Of course, we cannot tell them they cannot quote land grant rates. We have discouraged it for the reason that many of the railroads are not in possession of all the information necessary to compute the actual land grant rate, and in many cases where they have created a controversy and conflict between certain bidders and certain Government offices, which later on worked out the rate from complete information. That is the reason we have discouraged railroads in doing that.

Q. Well, the only point I want to make is this: Any shipper can go to the railroad and get the land-grant rates so far as the railroad company has the information between any two points. A. Absolutely, no reason why he could not.

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[1] (C) Tr. 1291-92.

Mr. Wooden: Even as to whether it involves division sheet?

The Witness: Well, the rate, itself, would not disclose division.

Trial Examiner Norwood: But it would be based on division; is that right?

The Witness: In the case of a joint route, it would be based on the divisions.

Trial Examiner Norwood: That is, if a shipper asks a railroad for a particular rate to a particular destination?

Mr. Wooden: Land-grant rate.

The Witness: Yes.

By Mr. Clark:

Q. Even if they were participated in by several carriers jointly?

Trial Examiner Norwood: Yes.

A. They could give them the final rate without any question.

Q. Surely. A. They would not have to disclose to the applicant for such information the factors which led up to it.

Q. It would not be necessary, would it? A. No.

Q. Not at all."[2]

The same witness testified further:

"Q. In such a case would you expect all the traffic managers of all the bidders to have equal access to that information, or just some particular traffic manager who had a particular entree to the source of information in the railroad company? A. I think anyone who has had sufficient experience in transportation to have reached that position of traffic manager would have equal access to the information.

Q. Suppose one of the mills was not shipping direct over that road: Would it be possible for him to get that information? A. I think it is possible he could get it."[3]

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[2] (C) Tr. 21142-44.

[3] (C) Tr. 2522.

Fry, Purchasing Officer of the U. S. Department of Interior testified as follows:

> "Q. Does your branch that operates under your jurisdiction, in dealing with the railroads on land grant matters, find that the railroads themselves do not always know in advance what the land grant rate is? A. May I ask what you mean by 'in advance'?
>
> Q. Before the railroad's transportation bill is submitted for payment. A. Well, there are regularly established formulas for working out land grant deductions between given points and they would know from their side as the Government knows from its side what they are."[4]

c. Tabulations of Bids and Abstracts of Prior Lettings

Executives of numerous respondents testified that they had obtained land grant information from this source.[1]

Taylor of the Bureau of Reclamation and Rice of the War Department also testified that land grant rates are shown on the abstracts of bids.[2]

Illustrative of this source of information are the following exhibits which are tabulations of bids introduced in evidence by the Commission, all of which contain land grant

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[4] (C) Tr. 175-76.

[1] Alpha: Fellows, Sales Manager (R) Tr. 25784-85, 25803-05.
Postelle, Sales Manager (R) Tr. 25040-42, 25153, 25167-69, 25228-29, 25234, 25278, 25302.
See also Resp. Ex. 1081.
Florida, Trinity, Signal Mountain, Consolidated: Storey, Vice President (R) Tr. 47597-99.
Hermitage: McGovern, Sales Manager (R) Tr. 32624-26, 36349-54.
Lone Star: Koch, Vice President (R) Tr. 32722-24.
Missouri: Alexander, President (R) Tr. 37128-29.
Nebraska: Hoenig, Sales Manager (R) Tr. 42055, 42121-23.

[2] (C) Tr. 1750, 21653-55, 3546-47.

rates: Com. Exs. 118, 156, 165, 168, 169, 175, 180, 182, 185, 187, 767, 770, 773, 778, 781, 787, 789, 792; Resp. Ex. 384 A-C.

d. Government Circulars and Other Publications

Executives of various respondents testified that they had obtained land grant information from this source.[1]

Several of these witnesses testified that they had obtained circulars containing this rate information from the Quartermaster of the War Department as long ago as 1910.[2] There is in evidence, for example, a letter from the Quartermaster General to Volunteer enclosing a copy of "O.Q.M.G. circular letter No. 33, land-grant percentages,"[3] together with the circular letter.[4] This circular was specified by Oliver, Vice President of Southern Railway as one of the sources used by his company,[5] the circular having been reissued as late as June 30, 1937.[6] This witness testi-

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[1] Alpha: Fellows, Sales Manager (R) Tr. 25803-05.
Dewey: Moore, R. W., Vice President (R) Tr. 47014-20.
Hermitage: McGovern, Sales Manager (R) Tr. 36349-52.
Huron: Meyers, Traffic Manager (R) Tr. 33307-09.
Lone Star: Koch, Vice President (R) Tr. 32722-24.
National: Dannelly, Vice President (R) Tr. 39654-56.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38382-94, 38428-29, 38435-39, 38503-04, 38533-34, 38539-40.
Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 31915-18.
Volunteer: Roberts, Traffic Manager (R) Tr. 31812-13, 31828, 31820, 31962-63.

[2] Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39015-18.
Koch, Vice President, Lone Star (R) Tr. 32722-24.

[3] Resp. Ex. 2249.

[4] Resp. Ex. 2250.

[5] (R) Tr. 47774-75.

[6] Oliver, Vice President, Southern Railway (R) Tr. 47797.

fied that the circular in question dealt with only the railroads on which there are specific land grant deductions and in which his railway was particularly interested but that it did not contain rates from all railroads or between all shipping and destination points throughout the United States.[7]

Rice, Attorney in the War Department, testified that it is the policy of the Qaurtermaster General to keep the land grant rates secret although he conceded that the War Department once published a pamphlet containing such rates.[8]

Fry, Purchasing Officer of the Department of Interior also testified that the War Department printed a pamphlet showing land grant mileages and grants but not the rates. He said that it would be possible to publish the rates but that it would be a waste of time since they changed so often.[9]

Land grant rates were provided on the TVA lettings, on the Ft. Peck letting and on the Bonneville Dam letting.[10] Government witnesses not from the War Department testified that it would be difficult and unfeasible for the government to publish the rates.[11]

e. Other Sources of Land Grant Information

W. R. Blair, of Southwestern, testified that his company had secured circulars of land grant rates issued by the Quar-

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[7] Oliver, Vice President, Southern Railway (R) Tr. 47798.

[8] (C) Tr. 1731.

[9] (C) Tr. 226-29, 231-33.

[10] Rice, Attorney, U. S. War Dept. (C) Tr. 1493-94, 3546-47; and see Com. Ex. 161 B, also Tr. 1635-36; Resp. Ex. 883: Correspondence relative to land grants to various TVA projects in the invitations or otherwise.

[11] Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 21136.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1287-93.

termaster General through the El Paso Chamber of Commerce, which has an efficient land grant rate bureau.[1] The same witness and executives of other respondents testified that their information was obtained by their salesmen through Government abstracts and agencies.[2]

The evidence shows generally that The Cement Institute did not supply its members with this type of information excepting during the period of the Institute's land grant service from December 1935 to the end of 1936.[3] For evidence relative to the Institute land grant service see Part V J, p. 1132.

4. Independent Computations of Land Grant Rates by Respondents

Several of respondents' executives testified that they had computed land grant rates themselves with information obtained from the railroads, the government and abstracts of bids.[1] Examples in evidence showing the actual independent calculations made by officials of respondent companies are Resp. Exs. 1322, 1329.

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[1] (R) Tr. 39015-18.

[2] Blair, W. R., Sales Manager, Southwestern (R) Tr. 39015-18.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38435-39.

[3] Postelle, Sales Manager, Alpha (R) Tr. 25430-32, 25450-51.
Alexander, President, Missouri (R) Tr. 37128-29.
McGovern, Sales Manager, Hermitage (R) Tr. 36324-26.
Browder, *supra*, Tr. 38503-04.
Dannelly, Vice President, National (R) Tr. 39654.
Koch, Vice President, Lone Star (R) Tr. 33232.

[1] Browder, *supra*, Tr. 38435-39.
Meyers, Traffic Manager, Huron (R) Tr. 33307-09, 33563-64.
Blair, W. R., *supra*, Tr. 39363-64.
Coogan, Vice President, Alpha (R) Tr. 24409-10.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35537-38.

5. Availability of Information Concerning Railroad Divisions

As already shown "divisions" are the proportion of freight which each railroad line secures on a shipment involving more than one line.[1]

They are also explained as the breakdown of the total freight rate on a shipment.

Rice, Attorney of the War Department, testified that it is not generally known how this breakdown is figured and as far as he knew it was not known to anyone except the railroads and possibly the Government for purposes of calculation of the land grant rate.[2] However, there was evidence that traffic managers of cement companies would know the divisions if the information was provided by the railroads and that there were instances in which the railroads had given out the information.[3] In order to compute a land grant rate as distinguished from obtaining the rate itself the carriers' division sheets or percentages are necessary.[4] There was testimony of several witnesses that division sheets, as such, are not made public but that the railroads usually provide information as to what the divisions themselves are.[5]

Oliver, Vice President of the Southern Railway, testified that it was not the general practice to give the sheets to shippers other than shippers of coal, but there have been instances in which even the sheets have been furnished to cement manufacturers.[6]

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[1] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38208-09.
Hayghe, Proc. Div., U. S. Treas. Dept. (C) Tr. 21139-42.

[2] Rice, Attorney, U. S. War Dept. (C) Tr. 1811-17, 1782.

[3] Reiter, Vice President, Universal Atlas (R) Tr. 3370-73.

[4] Koch, Vice President, Lone Star (R) Tr. 32722-24.
Oliver, Vice President, Southern Railway (R) Tr. 47795-97.

[5] (R) Tr. 77695-97.

[6] Moore, Vice President, Dewey (R) Tr. 47418-20.
Coogan, Vice President, Alpha (R) Tr. 24935-36.
Resp. Exs. 2246, 2247 A-B: Division sheets from Southern R.R. dated 8/2/28.

6. Non-Exchange of and Non-Agreement on Land Grant Rates

Executives of the following respondents testified that they had not exchanged land grant rate information with competitors or agreed with competitors upon the use of particular land grant rates:

Missouri[1]
Alpha[2]
National[3]
Northwestern States[4]
Oklahoma)
Arkansas)[5]
Universal Atlas[6]
Monarch[7]
Lone Star[8]
Volunteer[9]
Southwestern (El Paso)[10]
Federal[11]
Bessemer[12]
Penn-Dixie[13]

There was testimony to like effect with respect to the period after the issuance of the complaint in this proceed-

[1] Alexander, President, Missouri (R) Tr. 37129.

[2] Coogan, Vice President, Alpha (R) Tr. 24195.

[3] Dannelly, Vice President, National (R) Tr. 39654-56.

[4] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36562-63.

[5] Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46534-35.

[6] Reiter, Vice President, Universal Atlas (R) Tr. 44532-33.

[7] Brooke, Vice President, Monarch (R) Tr. 42335-36.

[8] Koch, Vice President, Lone Star (R) Tr. 33232.

[9] Roberts, Traffic Manager, Volunteer (R) Tr. 31962-69.

[10] Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 39085-86.

[11] Bates, J. E., Sales Manager, Federal (R) Tr. 30625.

[12] Warren, F. B., Vice President, Bessemer (R) Tr. 32173.

[13] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38435-39.

ing.[14] In connection with lettings of the TVA in October 1934, there is in evidence on the letterhead of The Institute, a list of land grant rates provided by the Federal Traffic Section, Washington, D. C. The rates on this list were not used in computations of prices filed with the Code Authority and bid to TVA.[15]

Typical of such testimony was that of Brooke, Vice President of Monarch:

> "Q. Have you ever had, or any officials of your company, to your knowledge, conferred with competitors as to what land grant rates you would use? A. We have not." (Tr. 42336)

Hayghe, of the Procurement Division of the Treasury Department, testified that he knew nothing about circulation of any information among the cement mills.[16]

It was necessary to use the lowest land grant rate information obtainable in order to participate on a letting.[17]

Manley, General Manager, Hawkeye, testified that there was so much interest in land grant rates among manufacturers that the subject of such rates was discussed at various times in competitive circles.[18] Another witness testified that while his company (Hermitage) did not exchange land grant rates with competitors it did obtain some rates from

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[14] Reiter, Vice President, Universal Atlas (C) Tr. 4532-33. Roberts, Traffic Manager, Volunteer (R) Tr. 31836.

[15] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38539-40. Com. Ex. 883-2 K-2 N, Resp. Exs. 2919 A-D, 2920 A-C.
[Evidence concerning TVA lettings on which land grant information was provided by TVA itself is collated under Part IV F, *infra*, pp. 982, 991.]

[16] (C) Tr. 2522.

[17] Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 39364.

[18] (R) Tr. 41898.

them, but in no instance did this occur without request.[19] This did not happen over a period of years and only a few points were involved. His company was obtaining such rates at the same time from the railroads.[20]

In connection with the question of interchange of such information between respondent Nebraska and its parent, the Ideal Cement Company, Hoenig, Sales Manager of Nebraska, testified as follows:

> "Q. Now, on this question of land-grant rates, you told Mr. Werle that you received information from the railroads on land grant rates. A. Yes, sir.
>
> Q. Is it your testimony that you did not receive any land-grant rate information from the office of Mr. Boettcher, through the person of Mr. Martindale, the traffic manager in that office? A. I would not dispute that. I do not recall that we have because on my own direction for the last number of years, whenever a case of that came up we called the railroad company or we would take the last bids that we made on a job like that, which was, generally speaking, in almost every instance Fort Riley, and we would attempt either on the strength of what we would learn from the railroad company or the last bid that was made, to make another bid, as I said before, was usually futile. We never got that business.
>
> Q. In that connection, you sought the assistance of Mr. Martindale, the traffic manager? A. No, we did not.
>
> Q. In the office of the Ideal Cement Company? A. No, we did not secure the assistance of Mr. Martindale. Now, it may be at some time or other Mr. Martindale sent some information about land grant rates that he had secured somewhere, but if he did it would be only natural because we depended on that

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[19] McGovern, Sales Manager, Hermitage (R) Tr. 36349-54.

[20] Id., Tr. 36350-52.

department to keep us posted on freight rates, but, as I say again, I do not recall having such information as that.

Q. You did depend upon Mr. Martindale for freight rate information? A. Well, we depended upon Mr. Martindale's office. Mr. Martindale has not been with the company for some time, but we did depend on his office to a certain extent, I will say. I won't say altogether. They volunteered to furnish these freight rate sheets that we testified to this morning, and other incidental freight traffic information, but we do not depend on them altogether, because, as I stated this morning, we have a very efficient man in our office on whom I depend quite a little for information like that."[21]

7. Records of Land Grant Information Kept by Respondents

Executives of numerous companies testified that they kept company files or card systems with compilations of land grant rate information which they had obtained, or tabulations of such rates which they obtained from the railroads or on prior government lettings.[1]

Roberts, Traffic Manager, of Volunteer, testified as follows with respect to how he familiarized himself with land grant rates and the manner in which they were secured from the railroads:

"Q. Well, as I understand you, your first experience with land grant rates was in 1928 when you came with the company, is that correct? A. Shortly after that, I think.

Q. And have you taken steps to familiarize yourself with the rates, land grant rates? A. Yes, I have.

[21] (R) Tr. 42121-23.

[1] Postelle, Sales Manager, Alpha (R) Tr. 25153, 25234, 25278.
Moore, R. W., Vice President, Dewey (R) Tr. 27425-28.
Dannelly, Vice President, National (R) Tr. 39643-56.
Wing, Vice President, Penn Dixie (C) Tr. 8080-81; see Resp. Exs. 842, 862, 879, 880, 895, 901, 921-938, 962-967.

Q. Tell us what you did. How did you go about that? A. Well, the biggest drawback is securing divisions to the commercial rate from the carriers. We have been furnished with the various divisions, however, on occasion.

Q. Well, my question was what you did to familiarize yourself with the rates, and what steps did you take to find out? Did you consult with any carriers, for example? A. Oh, yes, yes. I consulted with——

Q. Well, with whom did you consult with the carriers and what was the nature of the information you obtained? A. I consulted with several rate men, both the Southern and L. & N. R. Railroad at Knoxville, and I also made trips to Atlanta and consulted the men who worked up this information for the Southern Railroad.

Q. Did they explain to you about land grant rates and how they figured them, and so on? A. Yes, they did.

Q. Did you find anyone connected with any of these carriers, whom you consulted, reluctant to give you information about that? A. No."[2]

8. Differences in Computations of Land Grant Rates

Evidence in the record of witnesses for the Commission and for the respondents alike shows generally that there are differences in computing land grant rates whether the computation is by Government agencies, the railroads or shippers. In this connection, Government witnesses testified in substance as follows:

Taylor, U. S. Bur. of Reclamation:

Any one can figure the rates but no two figure them alike because of the diversions between land grant and non-land grant routes. Rates are different to all mills and difficult to compute. If a group of

[2] (R) Tr. 31792-93.

shippers had the same information with respect to the rates they would figure them exactly the same.[1]

Fry, U. S. Dept. of Interior:

It is not possible for a government purchasing agent to tell from the face of a bid whether the actual land grant rate was used or some estimate. The government officials themselves do not know what the precise rate will be on a particular shipment in advance of a settlement of the award by the general accounting office. Until the general accounting office has passed on a rate, the bidders use the rate which the railroads use. These rates are complicated and the government itself has difficulty in working them out.[2]

Hayghe, Proc. Div. U. S. Treas. Dept.:

The rates are subject to change on the actual settlement between the government and the carrier. The government's figures are not necessarily final because the railroad may appeal to the Comptroller General for a review of the rate used in the settlement. As a rule they do not appeal where the amount is only a few hundred dollars and consequently in practice the government's figures are finally figured by the Comptroller General. He is decidedly almost always incorrect in his computation. He gave an instance where land grant rates furnished by the Florida State Procurement office was incorrect due to a division of the "L. & N" Railroad which was ambiguous in its application. The so-called final rate given out by the railroad

[1] (C) Tr. 1287-93, 1305.

[2] (C) Tr. 220-23, 174-76, 204-05, 217.

is very seldom the rate at which the final settlement is made.[3]

In theory there is no difference in land grant rates but in practice there may be slight differences due to errors in computation or differences of opinion as to the diversions of the rates between land grant and non-land grant railroads.[4] [This testimony is set forth in full under Part V J, at pages 1152-54 *et seq.*]

He recalls no claim made by a cement shipper because an estimated rate differed from the actual.[5]

Rice, Attorney, U. S. War Dept.:

Cement shippers use a figure which they calculate to be near the land grant rate which he does not consider to be the best information obtainable. The best information in his judgment would be allowing the government to compute the rate alone through the shipper selling at a mill price.[6]

He could not recall any instance where the land grant rate which he estimated and figured out differed from that authorized by the Comptroller General in the final settlement with the railroad.[7]

Testimony of a railroad official in substance was as follows:

Oliver, Vice President of the Southern Railroad:

His company possesses the information required in order to compute the rates which is available in

[3] (C) Tr. 2466-67, 2280, 2517, 21142-46, 2419-24.

[4] (C) Tr. 2260-66.

[5] (C) Tr. 2463.

[6] (C) Tr. 1549-50.

[7] (C) Tr. 1653-54.

the form of the railroads' own records of its own tariffs, percentages and division sheets compiled over a period of years based on experience in handling land grant rate traffic and also based on publications by the War Department, which are a compilation of the War Department's experience under the land grant laws.[8]

The railroads computations are reasonably correct although sometimes there are disagreements with the government agencies and on occasion where a question of principle was involved the railroad has appealed to the Court of Claims. The rates furnished by the railroads are not estimates in the sense that the railroad does not know whether or not they are correct—they are correct to the best of its knowledge. So far as the witness knows, the railroad has the same data available for computation as the Comptroller General.[9]

Executives of respondent companies testified in substance as follows:

While there are variances between the railroads' figures, which respondents use, and those of the Government, the Government rate is the one which is generally protected against.[10] There have been occasions where the Government has admitted that it was in error in computing rates.[11]

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[8] (R) Tr. 47781-82.

[9] (R) Tr. 47778-82.

[10] Coogan, Vice President, Alpha (R) Tr. 24195-97.
Colburn, Vice President, Marquette (R) Tr. 39981-82.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 48435-39, 38208-09, 38505-06.
Reiter, Vice President, Universal Atlas (C) Tr. 3370-73.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46534-35.

[11] Moore, R. W., Vice President, Dewey (R) Tr. 47410-11.

The Government rate generally prevails in the case of such differences regardless of their correctness.[12]

The companies generally use the rate obtained from the railroad and it is immaterial whether it is the actual rate or an estimated rate which differs from the Government's figure.[13] However, there is evidence that the rate which they obtained from the railroad was not an estimate as opposed to an actuality.[14] They are able to compute the rates closely enough for the purposes of comparison in computing prices.[15] A competent traffic manager knowing the commercial divisions can figure the rates just as exactly as a government official.[16]

Using the rates provided by the railroads and calculated by their own traffic departments, respondents have on various occasions checked their results and found them to be the same as those of the Government rate clerks and the same as the figures on which the final accounting between the Government and the Railroad was made.[17] Similarly, there was testimony that a witness knew of no case in which the rate used on the final settlement was not the same as that made out by the railroads.[18]

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[12] Reiter, Vice President, Universal Atlas (C) Tr. 3370-73.

[13] Storey, Vice President, Florida, Trinity & Signal Mountain (R) Tr. 47597-99.

[14] Id., Tr. 47602-04.

[15] Meyers, Traffic Manager, Huron (R) Tr. 33307-09.

[16] Reiter, Vice President, Universal Atlas (C) Tr. 3370-73.
Neylan, Ass't General Sales Manager, Lone Star (C) Tr. 6646-47.

[17] Blair, W. R., Sales Manager, Southwestern (R) Tr. 39363-64.

[18] Moore, R. W., Vice President, Dewey (R) Tr. 47028-30.

The differences in computations between their figures based on information received from the railroads and the Government's figures are inconsequential. Thus in the case of one respondent the total variance over a year and a half amounted to about $24.00.[19]

In case of discrepancies of rate information obtained from the various sources, respondents employed the lowest rate in order to be competitive, thereby giving the Government any advantage.[20]

9. Special Freight Rates

It has been shown above (*supra*, p. 755) that special freight rates differ from land-grant rates in that the special rates are slightly reduced rates to the Government between points where land-grant rates are not in effect.

Holmes, Legal Advisor in the War Department, testified that special rates on government shipments are common and that there are very few areas where some special or land-grant savings cannot be obtained. He said further that many railroads have equalization agreements with the government to equalize land-grant rates and on certain movements the special rates are given without connection with the equalization agreements.[1] While there are no land-grant rates in the northeastern United States, there

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[19] Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35537-38.
Coogan, Vice President, Alpha (R) Tr. 24409-11.

[20] McGovern, Sales Manager, Hermitage (R) Tr. 36332, 36349-54.
Roberts, Traffic Manager, Volunteer (R) Tr. 31846-47.

[1] (C) Tr. 21083-84.
To the same effect re equalization agreements between railroads and Government, see Oliver, Vice President, Southern Railway (R) Tr. 47798.

are certain special rates which it is possible for the government to secure.[2]

Special rates are ascertained by cement shippers since they are published and have to be approved by the Interstate Commerce Commission or the State Public Service Commission.[3]

The government obtained the benefit of a reduced cement price in cases of special freight rates.[4]

The following are examples of special freight rates found in the record (others are referred to under the digest of evidence concerning West Coast cement companies, Part XVII, p. 2724):

On the Passamaquoddy Dam project in Maine a special rate was put into effect by the Maine Central Railroad reducing the through-haul rate from Thomaston to Eastport and the combination-haul rate from another point. It was five cents lower per hundredweight than the commercial rate. This special rate was met by railroads serving both the Hudson and Lehigh Valleys.[5]

Garity, Director of Purchases for TVA, testified that on the Norris Dam project TVA obtained a special unpublished rate which it made available to the cement industry.[6] A special rate also was put into effect on the Bonneville Dam project.[7]

Several respondents testified that there are no special rates to which the Government is entitled in any territory where they do business.[8]

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[2] (C) Tr. 21071.

[3] Ackerman, Sales Manager, Lawrence (C) Tr. 7288-90.
Resp. Exs. 757-758: Alpha's interoffice letters 10/8, 10/35 re special rate.

[4] Id., (R) Tr. 31289-90.

[5] Id., (C) Tr. 7288-90.

[6] (C) Tr. 2723-25.

[7] Rice, Attorney, U. S. War Dept. (C) Tr. 1797-98.

[8] Wood, General Manager, Green Bag, W. Va. (R) Tr. 29525.
Warren, F. B., Vice President, Bessemer (R) Tr. 32173-74.

10. Decimals

Decimals in land grant rates are related to the factor of divisions between land-grant and non-land-grant railroads, together with the application of the resulting rate to particular poundages.[1] The rates are figured on the mileages involved and much calculating is required. Depending upon the number of decimal points to which the computations are carried, the figures will vary.[2]

Fry, Purchasing Officer in the Department of Interior, testified that ordinarily where a per barrel price includes a great many decimal points, it indicates that land-grant rates have been used in the computation. Government agencies in computing such rates sometimes figure them out to the eighth decimal point.[3] Rate figures provided by the railroads usually carry three or four decimals and in turn these figures are multiplied by 380 pounds, which is the weight of a barrel of cement, in order to find the rate per barrel.[4]

Thus, in quoting of Government destination costs the per barrel prices very frequently resulted in long fractions running into many decimal points.[5] Postelle, Sales Manager of Alpha, testified that in his personal observation of years the United States Engineers' Office and other Government offices had carried land-grant computations to just five decimals. He believed that this practice started with the United States Engineers' Office on the Wilson Dam project quite a number of years back. Railroad land-grant rate figures which Alpha obtained extended to six decimals,

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[1] Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1292.

[2] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38437-38.

[3] (C) Tr. 194-95.

[4] Roberts, Traffic Manager, Volunteer (R) Tr. 31965-66.

[5] Reiter, Vice President, Universal Atlas (C) Tr. 4062-64.

but because of the Government practice just mentioned, Alpha dropped the sixth decimal.[6]

Cement prices on shipments involving land-grant rates are an exception to the general practice of quoting in even cents per barrel at the destination.[7] If the fractions referred to above were over one-half cent and for working purposes were increased to the next cent, the Government would not get the full advantage of the land-grant rate. But if the fraction were dropped, whether more or less than a half cent, the Government would get an additional benefit. Reiter testified that he recalled that some bids were thus estimated with the fractions dropped starting a year or more ago.[8]

Postelle, Sales Manager of Alpha, testified that the practice of disregarding fractions of a cent was initiated by Signal Mountain on a letting at Fort Oglethorpe, Ga. on February 11, 1937.[9]

Executives of several respondents testified that in computing prices involving land-grant rates they had dropped fractions on some occasions and on other occasions had not. This depended on what they found necessary to meet the practices of their competitors, as ascertained in the field or from tabulations of bids, and when it was done it lowered the destination cost. The fractions were not dropped, however, until computation of the price was reached, *i.e.*, the sum of the base price plus freight.[10]

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[6] (R) Tr. 25341-42.
See Resp. Ex. 901; Alpha's office destination card for Abbeyville, South Carolina, used on bid of October 31, 1936.

[7] Reiter, Vice President, Universal Atlas (C) Tr. 4042-43.

[8] Reiter, *supra*, Tr. 4063-64.

[9] (R) Tr. 25329-30; and see Resp. Ex. 896: Alpha's work sheet with notation.

[10] Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35538-39.
Roberts, Traffic Manager, Volunteer (R) Tr. 31967.
Postelle, Sales Manager, Alpha (R) Tr. 25329 35.
Stone, Vice President, Universal Atlas (R) Tr. 10154-55.

Thus, Browder, Traffic Manager of Penn-Dixie, testified as follows:

> "Q. Now, Mr. Browder, in figuring bids where land-grant rates were involved, how has the Penn-Dixie Company handled the fractions involved in the figuring? A. Why, at different times we have handled that in different ways. We have at times retained all of the fractions; at times we have dropped all fractions beyond the fourth decimal place or the fifth decimal place, and we have also dropped at the present time, and for some time past, dropped all fractions and quoted just in dollars and cents.
>
> Q. And what were the circumstances which led you to add or to drop fractions? A. Well, in the case of dropping all the fractions there we found that some of our competitors were dropping all fractions, and in the next letting we had we dropped all fractions and continued to do that.
>
> Q. Under what circumstances did you find that your competitors were dropping fractions? A. At the opening of one of the Government bids we found, when the bids were tabulated, that all the fractions had been dropped by some of our competitors."[11]

He testified further:

> "Q. • • • Now, on the dropping of fractions in land-grant rates you testified about this morning, you told us that one of the reasons for the differences in the way that a person arrived at a land-grant rate, I mean the result that they arrived at in figuring land-grant rates from the result arrived at by another one was sometimes due to the dropping of fractions, do you recall? A. In their calculation, yes.
>
> Q. Do you recall an instance in Alabama just about a year previous to the issuance of the complaint in this case, where it became a practice on your part and your competitors to use fractions to the third point? A. I do not recall any particular point in Alabama. I know that my own company, we have found competitors would drop fractions to

[11] (R) Tr. 38444-45.

the fourth place and the fifth place, or the third place, and they finally dropped them altogether, and we have met that competition when we found it; the next time we would bid at that point we would do the same thing."[12]

Executives of respondent companies testified that there was no discussion among representatives of cement mills concerning the dropping of these fractions and that they had no communications in that connection with competitors.[13] Bass, Attorney-Examiner employed by the Federal Trade Commission, testified that Sunderland, President of Ash Grove, told him it was necessary frequently to carry the price computation to a number of decimal points for if one company dropped a decimal or so, it would disrupt the price structure.[14]

C. Methods of Computation of Prices Where Land Grant Rates Involved; Benefits of Such Rates Obtained by Government.

The evidence digested here does not include evidence concerning the use of the control clause during the Code period or thereafter, nor does it include details of evidence concerning the use of the equalization clause which was put forth by the Government in 1938 after the complaint herein had been issued. That evidence is set forth under Part IV D, commencing at p. 817, *infra;* especially subdivisions 7-9 thereof, at pp. 846-72, *infra.*

The following is a summary of the testimony of executives of various respondents relative to the computation of prices where land grant rates were involved and how the government obtained the full benefit of such rates.

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[12] (R) Tr. 38524-25.

[13] Reiter, Vice President, Universal Atlas (C) Tr. 4063-64. Postelle, Sales Manager, Alpha (R) Tr. 25329-35.

[14] (R) Tr. 13399-400.

Sales to the government involving land grant rates are, as a rule, the only exception to the general practice of quoting the government the same price at a given destination as is quoted to commercial customers[1] and such sales are the only ones in which the companies bid lower than they do on commercial business.[2] In like manner such sales are an exception to the general practice of government departments to invite quotation of prices at the point of use.[3]

In order for the government to obtain the benefit of land grant rates it is necessary that title to the shipment be taken by the government at the mill and prices were so quoted that such title could be taken.[4] To accomplish this shipment was made on a government bill-of-lading.[5]

Respondents always quoted the government in a manner which was calculated to secure to it the benefit of the land grant rates.[6] To that end respondents quoted in the manner requested in the invitation issued by the government,[7]

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[1] Coogan, Vice President, Alpha (R) Tr. 24034.
Bowen, Vice President, Lehigh (R) Tr. 27062.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38148.

[2] Browder, *supra*, Tr. 38308.
Dannelly, Vice President, National (R) Tr. 39714-15.
Moore, R. W., Vice President, Dewey (R) Tr. 43725-26.

[3] Bowen, *supra*, Tr. 27064-66.

[4] Coogan, *supra*, Tr. 24197-99, 24218-20, 24392, 24400-02.
Fellows, Sales Manager, Alpha (R) Tr. 25809-11.
Browder, *supra*, Tr. 38148, 38434-35, 38438-39.
Dannelly, *supra*, Tr. 39627-28.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46532.

[5] Meyers, Traffic Manager, Huron (R) Tr. 33567-71.

[6] Coogan, *supra*, Tr. 24193-94, 24199-200, 24400-01.
Koch, Vice President, Lone Star (R) Tr. 33225-26.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35531-34.
Colburn, Vice President, Marquette (R) Tr. 39034-35.

[7] Colburn, *supra*, Tr. 39034-35.
Moore, R. W., *supra*, Tr. 47003-04.

one witness testified that he could recall no instance where the government was deprived of any benefit to which it was entitled.[8] Depending on whether variations in the land grant rates used by respondents in their computations were above or below the actual land grant rate finally settled upon between the government and the railroad, the government could obtain more or less than the full benefit of the rate in the price bid.[9] For the same reason some respondents at times quoted higher or lower prices than their competitors.[10] Where the information as to the rate varied with different sources, the lowest rate was used.[11] If all bidders knew the exact rate, then all could use the lowest and give the government the full benefit.[12] Similarly, the government received the benefit of special rates to which it was entitled.[13]

Executives of most of the respondents who testified on this subject stated that they gave consideration in their computations to land grant rates available from the mills of competitors as well as from their own mills.[14] Generally,

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[8] Fellows, Sales Manager, Alpha (R) Tr. 25806-07.

[9] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38508-09.

[10] Roberts, Traffic Manager, Volunteer (R) Tr. 31968-69.
Meyers, Traffic Manager, Huron (R) Tr. 33563-64.

[11] McGovern, Sales Manager, Hermitage (R) Tr. 36332.

[12] Id., Tr. 36353.
Browder, *supra*, Tr. 38512-13.

[13] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36565.

[14] Coogan, Vice President, Alpha (R) Tr. 24974-76.
Postelle, Sales Manager, Alpha (R) Tr. 25130-31, 25462-64.
Fellows, *supra*, Tr. 25802-03.
Bowen, Vice President, Lehigh (R) Tr. 27082-84, 27101-02.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35529-31.
Alexander, President, Missouri (R) Tr. 37128-29.
Elcock, Vice President, Southern States (R) Tr. 37583-84, 37616, 37660-61.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46532.
Moore, R. W., Vice President, Dewey (R) Tr. 47026-28.

respondents' prices were computed so as to be as low or lower than the prices of their competitors at the destination and were computed on the basis of the lowest land grant rate which was necessary to be competitive and which might affect the price, regardless of the mill from which it was applicable.[15] An executive of one respondent testified that he did not give consideration to land grant rates from non-base mills.[16] Another testified that it was wasting time to ascertain the land grant rates from more than four or five mills in a given area where his mill generally had lower rates than its competitors.[17]

Since land grant rates did not apply from all the mills bidding at a given destination, in bids by those mills the Government still obtained the benefit of the land grant rates applicable from other mills.[18] At times the government has the benefit of the allowance of more than the commercial freight rate and more than the land grant rate[19] and there

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[15] Bowen, Vice President, Lehigh (R) Tr. 27081, 27103-04, 27141-42.
Roberts, Traffic Manager, Volunteer (R) Tr. 31841-43.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35529-31.
McGovern, Sales Manager, Hermitage (R) Tr. 36329-30, 36332.
Alexander, President, Missouri (R) Tr. 37128-29.
Elcock, Vice President, Southern States (R) Tr. 37616, 37661-63.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38501-02.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39216.
Dannelly, Vice President, National (R) Tr. 39653-54.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46532.
Moore, R. W., Vice President, Dewey (R) Tr. 47401-08.
Storey, President, Consolidated (R) Tr. 47603-04.

[16] Elcock, *supra*, Tr. 37663-64.

[17] Postelle, Sales Manager, Alpha (R) Tr. 25130-31.

[18] Fellows, Sales Manager, Alpha (R) Tr. 25808.
Browder, *supra*, Tr. 38512-13.

[19] Fellows, *supra*, Tr. 25806-07, 25917-21.

was some evidence that the government was never allowed less than the land grant rate.[20]

There was considerable testimony showing that different respondents used independent methods for computing their prices where land grant rates were involved which method varied with particular respondents from time to time.[21] Many testified that the prices which they arrived at were f.o.b. mill prices.[22]

The same base price which is used in computing the commercial price at a given destination is not used necessarily in computing the price to the government when land grant rates are involved but the base price at the mill with

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[20] Fellows, Sales Manager, Alpha (R) Tr. 25922.

[21] Coogan, Vice President, Alpha (R) Tr. 24197-99.
Fellows, *supra*, Tr. 25802, 25805.
Bowen, Vice President, Lehigh (R) Tr. 27070-71, 27076-80, 27101-02, 27141-42.
Roberts, Traffic Manager, Volunteer (R) Tr. 31841-43, 31966-68.
Koch, Vice President, Lone Star (R) Tr. 32671-72, 32735.
Meyers, Traffic Manager, Huron (R) Tr. 33307-09.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35529-31, 35531, 35534.
McGovern, Sales Manager, Hermitage (R) Tr. 36329-30, 36355-56.
Elcock, Vice President, Southern States (R) Tr. 37661-63.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38438-39, 38441-42, 38501-02, 38508, 38511-12.
Dannelly, Vice President, National (R) Tr. 39627-28, 39653-54.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46532.
Moore, R. W., Vice President, Dewey (R) Tr. 47325-26, 47401-08.
Storey, President, Consolidated (R) Tr. 47603-04.

[22] Bowen, *supra*, Tr. 27103-04.
Koch, *supra*, Tr. 32671-72.
Browder, *supra*, Tr. 38434-35, 38438-39.
Dannelly, *supra*, Tr. 39627-28.

the controlling or lowest land grant rate may prevail instead.[23]

The mill net received by the cement companies on these sales is generally lower than on commercial sales in order to compete with a more advantageous land grant rate of another mill but they sometimes net more while giving the government the advantage of the lowest rate and computing their price so as to be competitive at the destination.[24] Occasionally a higher mill net obtained by a respondent on a land grant shipment was due to a very low commercial price at the same destination which had been made in order to meet the competition of imported cement.[25]

The following excerpts and summaries of the testimony illustrate the different methods used by respondents in computing prices on sales which involve land grant rates.

ALPHA

Coogan, Vice President, testified:

> "Q. When you do have a problem involving the land-grant rates, what is your practice? Is it or is it not necessary for you to change your billing and invoicing of shipments on sales to the Government where the land-grant rates are involved? A. No, we

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[23] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38441-42, 38501-02.
Moore, R. W., Vice President, Dewey (R) Tr. 47401-08, 47421.
Bowen, Vice President, Lehigh (R) Tr. 27102-03.

[24] Id., Tr. 27141-42.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35531-35.
Moore, *supra*, Tr. 47325-26.
Coogan, Vice President, Alpha (R) Tr. 24845-46.
Postelle, Sales Manager, Alpha (R) Tr. 25461-62.

[25] Coogan, *supra*, Tr. 24845-46.

have quoted the Government during my experience in many different ways where land-grant rates are involved. At times we have figured up what the destination cost was using land-grant rates and deducted the land-grant rate from our mill quoting the resulting figure as a mill price. In other cases we have quoted a destination cost and stated the amount that they could deduct from our stated price in order to arrive at a mill price and move the shipment on a Government bill-of-lading. During the Code period we quoted a destination cost and after the control clause had been filed by one of our competitors, we used the control clause. Recently and since the Code period we have in many cases quoted them f.o.b mill, and still more recently we have quoted them under an equalization clause which was first brought out in the latter part of '38 by the Department of Agriculture."[26]

Fellows, Sales Manager, testified:

"Q. In your long experience in dealing with these land-grant rates, since you say 1913, what has been your experience? Can you tell me of any single occasion where the Government was deprived of its land-grant rate on any price that you made to them? A. No——

Q. The benefit of its land-grant rate. A. Not when we quoted the destination cost and provided for their taking delivery or title to the cement at the mill. It is very obvious, I think, that when we quoted, called for and quoted the f.o.b. destination price, that then there was no land grant involved, and they didn't get any advantage of land-grant rates, when the bids were called for in that manner. But where the control clause operated, they would get the advantage of the land-grant rates, and the competition resulting from land-grant rates. In other cases, we have deducted the commercial rate, and in doing that they took title at the mill, and the land-grant rate was applied and the shipments made on Government bills-of-lading. At other times we have given them,

[26] (R) Tr. 24197-98.

I think, more than the advantage of the land-grant rates in that when we quoted an f.o.b. destination price we allowed an amount greater than the commercial price or the commercial rate from our mill to destination.

• • • •

Q. Where land grant was not involved—the question was, Mr. Fellows—the Government did not lose anything. I was merely asking you about the cases where the land grant was involved.

• • • •

A. Well, land-grant rates don't apply to all destinations, from all points of production, and where land-grant rates don't apply, of course—it is just an advantage to the Government, of course.

By Mr. Leisure:

Q. Is it or is it not your testimony, Mr. Fellows, that where land-grant rates were involved, and where you bid, that you gave the Government the benefit of the land-grant rates? A. Yes, sir; except where they called for bids f.o.b. destination, and no allowances—

Q. Were they entitled to any land-grant rate benefit when they called for f.o.b. mill bids?

• • • •

A. F.o.b. mill?

If they called for a price f.o.b. mill, we bid f.o.b. mill, and they took title at the mill, and there was land-grant applicable to the point of destination, they were entitled to it, and got it.

• • • •

Q. Have you told us fully, Mr. Fellows, what your experience has been with respect to whether or not the Government was deprived of the benefit of any land-grant rates in any biddings that you had to do with,—any lettings? A. Why, as far as I know, yes. It is perfectly obvious, of course, that the Government does not get the advantage of any land-grant rate unless they take title at the mill."[27]

[27] (R) Tr. 25806-09, 25811.

DEWEY

R. W. Moore, Vice President, testified that his company secures information as to land grant rates from various cement producing points to points of delivery and that it has always taken into consideration the rates from competitors' mills in computing its bids. Dewey did not net more on sales to the government than it did on commercial sales at the same destination. Sometimes, but by no means always, it figured its price to the government by relating it to the commercial delivered price. Its general practice was to try and ascertain the commercial destination price but the Government usually obtained a lower price and not entirely because of the land grant rates but simply by telling Dewey its bid was too high.[28] It takes into account the lowest land grant rate from any mill which it considers may be a competitor, then figures back to a known base mill to ascertain what its competitor is. It deducts the freight back to the mill with the lowest land grant rate, whether it is a base mill or not, and makes its price as low as it figures any competitor will quote.[29]

HERMITAGE

McGovern, Sales Manager, testified that where land grant rates are involved, his company, in an effort to be competitive, takes the mill price in the area and land grant rate which, together, make the lowest delivered price to the government. It has no understanding with competitors to quote in that manner. In the event of varying information as to land grant rates, Hermitage uses the lowest rate. It does not merely bid the commercial price less commercial freight.[30]

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[28] (R) Tr. 47024-25, 47026-28, 47325-26.

[29] (R) Tr. 47401-08.

[30] (R) Tr. 36329-30, 36332, 36355-56.

HURON

Meyers, Traffic Manager, testified that he calculated the land grant rate from information concerning rates applicable in Huron's territory so as to approximate the figure ultimately used. On various projects where Huron was awarded the contract the Government shipped on its own bills-of-lading where it found it advantageous to do so and thus secured the benefit of the land grant rates.[31]

LEHIGH

Bowen, Vice President, testified:

> "A. We then reverted back in figuring our f.o.b. mill prices to the method that we had used before there was a Code and before we used the control clause.
>
> Q. And what was that method? A. If the calculation was at a time when we found that our competitors were observing their published quotations, then our method was to calculate with consideration to the land-grant and the commercial rates from competitive points and by analysis of their current destination prices——
>
> Q. You took the regular destination prices in those days, did you?
>
> • • •
>
> Our price f.o.b. our mill which we hoped would result in the cost of our cement at destination being as low, at least, as the cost of any of our competitors.
>
> *By Mr. Wooden*:
>
> Q. In other words, the f.o.b. mill figure you arrived at was then nothing but the equivalent of destination figure with the freight subtracted, wasn't it?
>
> • • •
>
> The Witness: Your Honor, it is not a fact as to most cases. With respect to cases where land-grant rates were a factor in the calculation, in most

[31] (R) Tr. 33307-09, 33568-71.

cases the figure was not the sort of a figure that Mr. Wooden says.

By Mr. Wooden:

Q. And how did you equalize the delivered price with what you hoped competitors would quote except by taking out the amount of freight that would result in an equalization?

A. The question is not at all clear to me. We did not quote a delivered price under those circumstances. We quote f.o.b. mill price.

By Mr. Wooden:

Q. I know you did, but you said you hoped to quote such an f.o.b. mill price that would be competitive at destination. A. Yes, sir.

Q. Didn't you make it the same at destination as your competitors quoting at that destination? A. Not at all.

Q. What did you mean? A. I meant exactly what I said, to make it as low, at least, as any of my competitors.

Q. Did you intend to make it any lower? A. In some cases, yes.

Q. Did you intend to make it any higher in some cases? A. No, I would not bid if I intended to make it higher. I would save the postage.

Q. Do you mean to say that you have deliberately and intentionally made your prices lower at destination than your competitors? A. I do not know what you mean by the term 'deliberately' and 'intentionally.' I have repeatedly testified the manner in which the Lehigh Company has made its prices on public lettings, that sometimes we have based those prices upon the assumption that competitors were observing their published quotations, and that they would be likely to do so on public lettings. In some cases we found that that assumption proved to be incorrect. In other cases, we have accepted as a going condition of competition the fact that competitors were not respecting and observing their pub-

lished quotations and have made prices that we thought would be low enough to get the business."[32]

He testified further:

"Q. Don't you figure back from the destination price on commercial business to find out what mill base should go into your destination cost figure? A. Well, I start first with my own base figure and from the competition in the field, attempt to compute whether that base figure quoted as an f.o.b. mill price is likely to be as low as my competitor. If that is so, then I quote, in some cases, the f.o.b. mill price, which is the base figure and, in most cases, usually the net would be the same as the net on commercial business.

However, when I find that that mill base figure is not sufficiently low for meeting the competition, then I must quote a lower f.o.b. mill figure, which takes into account the probable and possible competition of competitive mills that have a greater land grant advantage.

Q. But in such case your mill figure would be the same as your mill net on commercial business delivered to the same point, wouldn't it? A. No, not necessarily. It might be lower.

By Mr. Wooden:

Q. As a matter of practice, what has it been? Hasn't it been the practice and policy to make it the same as the mill net on your commercial business? A. No.

Q. It might be higher? A. It might, in some cases, be higher.

Q. In other words, you might quote the Government at a higher mill net than you would commercial business, on the same destination? A. It has been done.

Q. Why do you do that? A. Because from our knowledge of the competition in the field it seems to us that the price will tend to bring our cement at destination at a competitive figure.

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[32] (R) Tr. 27101-05.

Q. In other words, you are willing to charge the Government more than a commercial buyer at the same destination provided your competition will permit you to do it? A. And in more cases, charge them less."[33]

LONE STAR

Neylan, Assistant General Sales Manager, testified:

"A. So far as we are concerned, we try to meet that destination, if we are interested in the business, the lowest combination that we can find.

Q. A combination of what? A. Of various prices that we have reason to believe are being quoted or being used for computing prices f.o.b. the mills, plus the transportation from those various mills, as we find them.

Q. You mean the lowest sum of the base price applicable, plus freight from that base point? A. Well, you have to vary it a little bit there, because what may be applicable on commercial business may not be applicable where land grant rates are involved.

Q. Well, so far as applicable? A. So far as applicable, I would say yes."[34]

Neylan testified further:

"Q. And didn't you say that you made the same price to the Government that you made to dealers? A. Generally speaking, yes. However, we always try to give the Government the benefit of a saving which accrues by virtue of land grant deductions.

Q. The delivered price to the Government is different, usually, also, isn't it, than the delivered price to the dealer? A. It may be true in some cases where land grant rates are involved.

Q. Then when you said that you ordinarily gave the Government the same price as the dealer, didn't you have reference to giving the Government the same mill net price that you gave to the dealer? A.

[33] (R) Tr. 27140-42.

[34] (C) Tr. 6670-71.

Not necessarily. We mean that where there are no land grant rates involved, we quote the Government the same price that we quote the dealer. Where the land grant rates are involved, we try to give them the benefit of the land grant rates deductions.

Q. You say that you give the Government the same price as the dealer? A. Where there are no land grant rates involved, yes.

Q. Do you say you give the Government a lower price than to the dealer where no land grant rates are involved? A. We give them what is equivalent to the dealer's price at that point, taking into consideration at all times any saving that may accrue to the Government by virtue of land grant rate reduction.

• • • •

Q. Then how can you say you are giving the Government the same price as the dealer?

• • • •

A. Where land grant rates are not involved, we give them the same price; where land grant rates are involved, we try to give them the benefit of the land grant rates deduction.

Q. Don't you start with the same mill net realization as the basis for figuring the Government destination cost? A. Not in all cases; no, sir.

Q. In how many cases? You say not in all cases. What is the practice? A. Well, land grant deductions may apply from mills that under ordinary circumstances would not compete in a market for commercial business. You have to take those things into consideration if you are trying to make your bid at least as favorable as that particular mill.

Q. But in a given locality, on Government business, isn't there a certain base price that applies to that business? A. No, sir; not where land grants are involved, no. It may go out into territory far beyond that you find competing on ordinary commercial business.

Q. Don't you find the land grant factor, whatever it may be, or however you may get it, affects your base price just as in ordinary business

in the territory where your mill base price prevails? A. That is only one step.

Q. Well, answer it so far. Isn't that true? A. That is one of the steps that we take, yes, but we have to compare that resulting price with what we can approximate from other plants.

Q. That is just like you do to determine which base price is prevailing, isn't it, on commercial business? A. Except that it carries you further than you usually find, on commercial business. That is, it does at times.

Q. It takes you into a wider territory? A. Yes.

Q. The principle is the same? A. The principle is virtually the same.

Q. Do you expect your quotations on Government destination cost basis with land grant rates figured in, to be identical, just like you expect your commercial business to be? A. We are going to try to make them that, if we are interested in the business, with what we get out of it.

Q. And if you have a lower freight rate from your mill, you are not going to use that to make a lower price than the mill that has a higher freight rate? A. If we give them the benefit of the lowest freight rate that we can find, whether that applies from our mill or some other mill, they get it.

Q. It depends upon whether the base prices may differ, though, doesn't it? A. It depends on what the combination of the two are, yes.

Q. You might have a lower freight rate and a higher base price that offsets it? A. That is true in other instances also."[35]

Koch, Vice President, testified:

"Q. Now, Mr. Koch, before you went with the Lone Star Company did any of the previous companies with which you were connected sell to the Government f.o.b. mill? A. Oh, yes.

Q. Which company sold in that way? A. Well, the first company I was with, the Sunflower Brand, or Kansas Portland, sold that way; the Iola Port-

[35] (C) Tr. 6671-75.

land sold that way; the Texas Portland would have sold that way if there had been any inquiry on Government business. And we carried the practice on and showed it in our marketing policy and trade ethics publication.

Q. Now, when you bid f.o.b. mill on behalf of Sunflower Company, or the Iola Company, how did you compute your bid price? A. Well, we computed them by two methods: Most of the Government business in those days was for reclamation work in Utah, Montana, South Dakota, Colorado, and, according to its location, we attempted as we do now, to estimate the delivered cost and take the railroad rate, or the land-grant rate, which, of course, is a railroad rate for Government purposes, and arrive at a mill base to quote. Otherwise, we quoted destination prices.

* * *

Q. Now, since you have been connected with Lone Star, what has been the policy of that company in quoting the Federal Government? A. We have continued on the same policy by one method or another.

Q. Now, will you describe what those methods have been? A. Well, we have quoted them at destination; we have quoted them at mill. Of late years we had, what I think I have noted in the evidence, what is called a control clause, which attempted to give them a price at our mill for invoicing purposes, so that they could move the shipment on their land-grant rates. In certain instances, now, we are quoting on an equalization basis. The things are changing from almost day to day; but the whole principle is still involved.

Q. You refer to the principle of selling f.o.b. mill? A. Yes."[26]

He testified further:

"Q. It was your policy, even then, [from 1909] was it not, to make your Government bid price the same as your commercial price at given destinations? A. No, not always. You started back from

[26] (R) Tr. 32671, 32675.

a commercial destination price, and endeavored to give them the advantage of their land grant.'"[37]

MISSOURI

Alexander, President, testified that it was his company's policy to quote prices which give the government as low a cost at the destination involved as the lowest price which it anticipates will be quoted by any competitor. It used the land grant rates from its own as well as competitors' mills and always tried to give the Government the benefit of available land grant or special rates.[38]

NATIONAL

Dannelly, Vice President, testified that it was his company's general practice to sell to the Government at f.o.b. mill prices because its competitors did and it wanted to give the government the advantage of available land grant rates. In this connection National tried to ascertain the lowest bid of a competitor and then deducted the land grant rate back to its own mill to arrive at its f.o.b. mill price. This, in a majority of cases produces a lower destination cost to the government.[39]

OKLAHOMA, ARKANSAS

Thompson, Sales Manager, testified:

"'Q. Mr. Thompson, you stated that you endeavored to give the Government the benefit of land-grant rates whenever such rates were involved in shipments from your mills. Now, will you state to us——'

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[37] (R) Tr. 33225-26.

[38] (R) Tr. 37128-29.

[39] (R) Tr. 39627-28, 39653-54, 39714-15.

By Mr. Brick:

Q. —whatever action either of your companies has taken in order to carry out that purpose? A. Well, we would determine our bid by taking into consideration the land-grant rates, whether they were to apply from our mill or a competitor might have a land-grant rate that would affect us in determining the price. After all, they are just special rates.

Trial Examiner Norwood: You mean you based your bid, then, your delivered cost or delivered price bid on land-grant rates where they obtained; is that right?

The Witness: Yes."[40]

PENN-DIXIE

Wing, Vice President, testified:

"Q. How do you determine the price that you will quote in that case? A. Where the land grant rate is used?

Q. Yes. A. We use the same calculation that we do with the commercial rates.

Q. In other words your base price plus freight if it is in the territory where your base price prevails? A. Yes.

Q. And if it is in territory where another base price prevails, you use that as the calculation there? A. Yes."[41]

Browder, Traffic Manager, testified [stipulated testimony]:

"37. It is Penn-Dixie's policy with regard to all government work, both State and Federal, to quote prices equivalent to the commercial market prices at the particular destinations involved. Exceptions to this policy have been Penn-Dixie's prices on TVA work after October, 1934, numerous f.o.b. mill bids

[40] (R) Tr. 46532.

[41] (C) Tr. 8081.

to the Federal Government, and, in effect, every price quoted to the Federal Government where land grant rates are involved. In the latter case, Penn-Dixie quotes in such manner that the Federal Government can take title to the cement at mill and thus secure the benefit of any land grant rate that may apply."[42]

Browder testified further:

"Q. How do you bill and invoice shipments on sales to the Government where land-grant rates are involved? A. We invoice them and bill them at a price f.o.b. our mill, so that they can take title to the property at the mill and secure the benefit of any special or land-grant rate that might be involved.

• • • •

Q. Prior to the NRA Code for the Cement Industry, Mr. Browder, how did the Penn-Dixie Company quote to the United States Government? A. We quoted them our commercial destination price and also quoted them f.o.b. our mill.

Q. And for how long did Penn-Dixie continue to quote the Government in that manner? A. As long as I was with the company, at least.

Q. Did you change your practice during the Code in connection with the so-called control clause? A. Yes.

Trial Examiner Norwood: When you quote f.o.b. mill, was that your base price or was it a price derived from the destination price, and the deduction of freight?

• • •

The Witness: It was to meet the competitive conditions at destination as we understood them to be, and it sometimes might be our price base that we would quote, or it might be considerably lower than that depending on the competitive conditions at destination and what the land-grant rate or freight rate from other mills might be.

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[42] (R) Tr. 38148.

Trial Examiner Norwood: You made them f.o.b. mill after taking the destination price into consideration?

The Witness: Not necessarily the destination, commercial destination price, but what our competitors might quote at their mills, and by calculating the difference in our rate and their rate we would probably subtract an additional amount from our price base to get at what we would quote to the Government.

* * *

Q. How did you arrive at your f.o.b. mill price that you quoted in those instances? A. Well, of course, we had to be governed by the cost to the Government at destination, because that is the way the Government tabulates their bids or makes their awards, what it is going to cost them at destinations, and we would figure our price to meet the competition that we found in the field from every other mill that could possibly ship in there. We quoted our mill price at such a figure that it would meet their price, plus their freight rate to destination.

Q. So you did calculate them in that way, then? A. Yes; you have to figure on the destination cost to the Government, or you never get an award."[43]

SOUTHERN STATES

Elcock, Vice President, testified:

"By Mr. MacIntyre:

Q. Why do you ask the railroads to send you such information? A. Because we want to find out what prices ought to be bid in so far as we can and in an effort to meet competition.

Q. Can you point out any information appearing in these three exhibits purporting to be land-grant information opposite the names of any locations other than Chattanooga and Rockmart, other than applying from basing points to destination?

* * *

Q. In other words, all the purported land-grant information there except that opposite the name of

[43] (R) Tr. 38439-42, 38502.

your company is that applying between basing points and various destinations? A. What you call the basing points; is that is correct.

Trial Examiner Norwood: Well, the railroads simply give you the land-grant rates from the stations you furnish the names of?

The Witness: Yes, sir.

Mr. MacIntyre: You did not ask for it from other shipping points than those that appear on that?

Mr. Brick: Of course he did not. We concede he would not."[44]

He testified further:

"Q. In other words, you find out what the basing-point price is and add the land-grant rate from that basing-point price at that basing point to the destination? A. That being a——

Q. The Government destination cost, so-called, then deduct your applicable land-grant rate from that destination back to your mill and quote them the result? A. That is right.

Q. Is that correct? A. Yes.

Q. And you do not use land-grant information that you thus receive from the railroad companies, as is shown by Respondents' Exhibits 2835 to 2839, in any other way; is that correct? A. I think it is.

Q. And the only reason that you secure information from non-basing mills such as Nashville and Knoxville is to determine what mill nets they would secure on the destination cost figured in the manner that we have just discussed; is that correct? A. No, I do not think that is correct. I think what we are trying to figure out is where in the world they got some of the rates they are using.

Q. But you do not use in any way the land-grant rate information from Knoxville and Nashville to figure any Government destination cost, do you? A. I do not see how. No, Mr. MacIntyre, I do not believe so."[45]

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[44] (R) Tr. 37616, 37617-18.

[45] (R) Tr. 37663-64.

Roberts, Traffic Manager, testified that his company takes the land grant rate furnished by the railroad and multiplies it by the weight of a barrel of cement [380 pounds], thus obtaining the per barrel rate, and then adds the base price which they have established, quoting the result as their price to the Government. In so doing, the company always uses the lowest land grant rate which it can obtain because it feels that its competitors will do likewise.[46]

1. Witnesses From Federal Departments

Officials of several federal departments engaged in the purchase of cement testified that where land grant rates are involved the government must take title at the mill in order to secure the benefit of such rates.[1] They testified further that for the same reason the government in such cases wants f.o.b. mill prices and would have no difficulty if it obtained them.[2] One of these witnesses stated that it

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[46] (R) Tr. 31841-43, 31966-68.

[1] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 197.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1293.
Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 1845-47.
Feldman, Supervisor of Procurement Procedure, Quartermaster's Corps, War Dept. (C) Tr. 2323-24.
Armstrong, Asst. Chief of Accounts, U. S. Bur. of Prisons (C) Tr. 2404-05.

[2] Fry, *supra*, Tr. 213-14.
Taylor, *supra*, Tr. 1282, 1287-88.
Rice, Attorney, U. S. War Dept. (C) Tr. 1733-34, 1798.
Hayghe, *supra*, Tr. 2453-54.
Peoples, U. S. Director of Procurement (C) Tr. 10456-58.
Holmes, Legal Advisor, Proc. Division, War Dept. (C) Tr. 21084.

would be natural for the railroads to deny land grant rates to the government if it did not take title at the mill.[3]

There was some difference of opinion among these witnesses as to the necessity for shipping on a government bill of lading in order to secure the land grant rate savings. Hayghe, Chief of Traffic, Procurement Division, United States Treasury Department, testified that it was not necessary.[4] Armstrong, Assistant Chief of Accounts, United States Bureau of Prisons, and Rice, Attorney, United States War Department, testified that it was necessary.[5]

In connection with government bills of lading, the Treasury Department, Procurement Division, on January 6, 1936, issued its Bulletin SPO No. 72 addressed to State Procurement Officers on the subject of "Invitation to Bid", in which it emphasized its doubt that the substitution of a government bill-of-lading on a shipment providing for delivery f.o.b. destination had the effect of vesting title in the government at the point of origin, and instructed the State Procurement Officers in the future to provide for award of contracts f.o.b. point of origin in cases where savings could be effected by means of land grant deductions.[6]

On March 11, 1936 the same office issued a supplement to the above mentioned bulletin No. 72 in which it stated that to comply with said bulletin it was necessary, when issuing invitations to request prices both f.o.b. point of origin with the bidder to specify the shipping point and f.o.b. destination. The supplement further stated that if the cost f.o.b. origin plus the cost of transportation was not more than 5% under the cost f.o.b. destination, it would be considered

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[3] Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 2446.

[4] (C) Tr. 2214-15.

[5] Armstrong, Asst. Chief of Accounts, U. S. Bur. of Prisons (C) Tr. 2404-05.
Rice, Attorney, U. S. War Dept. (C) Tr. 1798.

[6] Com. Ex. 374.

more economical to make the award on the f.o.b. destination basis.[7]

Further testimony of particular government officials regarding price computations involving land grant deductions was in substance as follows:

Fry, Purchasing Officer, United States Department of Interior, stated that where the land grant rate is used in figuring the destination price the government gets the benefit of the rate and if, in addition, the government deducts the commercial rate, then it obtains the advantage twice.[8]

Taylor, Assistant Chief of Engineering Division, United States Bureau of Reclamation, testified that the government, in computing to determine the lowest delivered cost and most advantageous bid, used the lowest land grant special or commercial rate where a mill price was bid.[9] He testified also that if a lower land grant rate than the actual is deducted in arriving at the mill price, the mill net of the shipper is increased and, on the other hand, if a higher than actual rate is deducted, the shipper's mill net is decreased.[10] The government has sometimes received bids of mill prices and sometimes has not.[11]

Rice, Attorney, United States War Department, testified that there were two ways to avoid trouble with land grant rates, one by f.o.b. mill quotations and the other that the government should publish the land grant rates.[12] He stated that if all companies offered cement to the Government at the same mill price there would be a variance in the net delivered cost to the government in accordance with

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[7] Com. Ex. 375.

[8] (C) Tr. 196-97.

[9] (C) Tr. 245.

[10] (C) Tr. 1281-82.

[11] (C) Tr. 1282, 1287-88.

[12] (C) Tr. 1733-34.

the different land grant rates.[13] He felt that manufacturers should bid mill prices and offer to equalize the same within certain competition.[14]

Hayghe, Chief of Traffic, Procurement Division, United States Treasury Department, testified that the government would get the full benefit of land grant deductions if the cement mills took the commercial destination price and deducted therefrom the commercial freight and bid the resulting mill price.[15] He testified further that any bidder should have an opportunity to equalize all differentials involved, including freight rates.[16] He said that all State Procurement Officers attempted to save money for the government by taking advantage of the lowest available freight rate.[17]

Armstrong, Assistant Chief of Accounts, United States Bureau of Prisons, testified that it had been the experience of his Bureau some years ago that it had an average saving of 10 cents a barrel where it secured the benefit of land grant deductions from commercial freight rates although the saving varied from particular shipping points.[18]

Custer, Senior Administration Assistant, Bureau of Supplies & Accounts, Navy Department, testified that the government secured no advantage of land grant rates on specified lettings at Pensacola, Florida, but that he did not give particular consideration to the unusually low commercial prices made at that destination in connection with the competition of imported cement.[19]

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[13] (C) Tr. 1777.

[14] (C) Tr. 1777-78.

[15] (C) Tr. 2444-45.

[16] (C) Tr. 2453.

[17] (C) Tr. 2483-85.

[18] (C) Tr. 2370-71, 2405-06.

[19] (C) Tr. 21301-04; Com. Exs. 378-383.

D. Control Clause.

1. Explanation and Inception of Control Clause and Destination Costs on Sales to United States

The use of the control clause in bids to the United States Government occurred only where land grant or special freight rates were involved. The evidence as to the nature of land grant rates, the territory in which they are available, the limited number of respondents affected by such rates and the various methods which they used in bidding prior to the Code is set forth under Part IV C, *supra*, p. 752 *et seq.*

Reiter, Chairman of the Code Authority, in a letter to Kantor of the Research and Planning Division, NRA, dated January 19, 1935, explained the filing by members of the industry and the acceptance by the Code Authority of "destination costs to the United States Government for various specific destinations" which "are not bid f.o.b. destination but * * * with a control clause filed and bid as a condition and as part of the destination cost". He said that the purpose was "to secure to the government the advantage of land grant or special freight rates * * * and to avoid the necessity of filing a mill price to that end." He then set forth the "usual form" of control clause and explained how the "Government Destination Cost" is always lower than the commercial destination price by at least the difference between the commercial and land grant freight rates. The pertinent portions of the letter are as follows:

> "* * * In order to secure to the Government the advantage of land grant or special freight rates available only to it and to avoid the necessity of filing a mill price to that end, Members of this Industry have filed with the Code Authority, and the Code Authority has accepted as proper filings, Destination Costs to the U. S. Government for various specific destinations. Such Government Destination

Costs are not bid f.o.b. destination but are bid for destination with a control clause filed and bid as a condition and as a part of the Destination Cost to the U. S. Government. The usual form of such control clause is as follows:

> 'The U. S. Government shall determine its costs f.o.b. cars *(bidder's mill)* for invoicing purposes on shipments moving on U. S. Government bills of lading to the above named destinations only, by subtracting from the above mentioned destination cost to the U. S. Government the land grant rate as determined by the U. S. Government as being applicable from *(bidder's mill)* to said destination or the actual commercial freight rate or special U. S. Government rate, applicable from (bidder's mill) to destination named, whichever rate is the lowest.'

The Government Destination Cost filed with us is always lower than the commercial destination price and the difference represents at least the difference between commercial freight rates and land grant or special Government rates. As examples, the commercial destination price f.o.b. Wiota, Montana is $3.79 gross in cloth, and the Government Destination Cost for Wiota, Montana, is $2.9645 gross in cloth; the commercial destination price f.o.b. For McClellan, Ala., is $2.51 gross in cloth, and the Government Destination Cost for Fort McClellan, Ala., is $2.353756 gross in cloth; the commercial destination price f.o.b. Gallup, N. M., is $3.81 gross in cloth, and the Government Destination Cost for Gallup, N. M., is $2.9895 gross in cloth.'"[1]

Executives of various respondents as well as officials from several government purchasing agencies testified that the control clause provided generally for the deduction from the destination cost figure of the lowest of the applicable land grant, special or commercial rate, in order

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[1] Com. Ex. 277 D-E.

to arrive at the bidder's f.o.b. mill price for invoicing and making shipments.[2]

The destination cost figure with which the control clause was used was defined variously. Reiter, Chairman of the Code Authority explained it in his testimony as follows:

[Italicized part quoted in Fdgs. Par. Seven (f)]

"A. *The Government destination cost would be the lowest sum of any price base plus the applicable lowest rate available to the government, whether land grant, special or commercial.*" (Tr. 3749)

Executives of Alpha and Lehigh said that it was predicated on the lowest cost to the government at the destination which could be computed through the use of land grant rates.[3] Rice, Attorney in the War Department, said it was a theoretical price which provided for certain deductions in order to arrive at the cost at the mill.[4] Hayghe of the Treasury Procurement Division said he didn't know how the figure was arrived at.[5]

Reiter, of the Code Authority, testified that the control clause originated when it was filed by a member of the industry to be used in connection with the early bids for cement to the TVA and that later the clause became a matter of general acceptance and practice in the industry on gov-

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[2] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38442-43.
Storey, President, Consolidated (R) Tr. 47604-06.
Sunderland, President, Ash Grove (R) Tr. 35512.
Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 172-73.
Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 2259-62, 2463, 21137-39.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 246-47.

[3] Fellows, Sales Manager, Alpha (R) Tr. 25805.
Bowen, Vice President, Lehigh (R) Tr. 27067-71.

[4] (C) Tr. 21356.

[5] (C) Tr. 2261-62.

ernment projects.[6] Several government purchasing officials confirmed that the clause was first used during the Code period,[7] there is testimony to the same effect by executives of those respondents which used the clause and the Commission has so found.[8]

Prior to the Code, government purchases involving land grant rates covered comparatively few destinations. Purchases were made regularly at those destinations and the correct land grant rates were well established by means of information made available on prior lettings. Around the time the Code became effective the government began purchasing cement for an increasing number of new destinations for which the land grant rates were not clearly established. Differences in the land grant rate computations of government agencies and bidders occurred more often. This led to loss of business by some companies and the development and adoption of this method of bidding in order to provide the government with the same savings it had been obtaining on f.o.b. mill quotations and to permit competition by companies which otherwise were unable to compete.[9]

Illustrative of the difficulties which confronted cement companies in complying with the NRA Code on lettings involving land grants are the Bonneville Dam letting by the War Department and TVA's Norris and Joe Wheeler Dams, all of which occurred in March, 1934. It has already

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[6] (C) Tr. 3050-52.

[7] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 172-73, 219-20.
Gay, General Manager, Santa Cruz (C) Tr. 8671-72.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 246-47.

[8] *Infra*, pp. 820, 840-41; Findings, par. 8(j).

[9] Bowen, Vice President, Lehigh (R) Tr. 27071-73.
Moore, R. W., Vice President, Dewey (R) Tr. 47014-20.
Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47597-602.

been shown that the War Department rejected all prices bid on Bonneville as not filed in accordance with the Code, and that similar violations occurred on the TVA projects.[10] Details of those lettings are set forth elsewhere.[11]

2. First Use of Control Clause

a. Filing and Purpose

Storey, Vice President of Florida, Trinity and Signal Mountain and President of Consolidated, testified that the quotation of destination costs to the government with the control clause was first used by his company early in 1934 on the TVA letting for Coal Creek, Tenn. and Sheffield, Ala. and that so far as he knew it was the first time that anyone had ever used the clause. He said it was devised in his office by him, together with one or two other men in his Chicago organization. He explained that the purpose of this method of bidding was to do as profitable a business as competition would allow on sales where the Government asked for mill prices. His testimony was as follows:

> "Q. In quoting to the United States Government, have any of your companies ever quoted a so-called destination cost to the U. S. Government with a so-called control clause? A. Yes, sir.
>
> Q. Do you recall when it was that this form of quotation was first used by any one of your four companies? A. Is your question, do I recall when it was?
>
> Q. Yes. A. I think early in 1934.
>
> Q. You have one of the four companies in mind, doubtless; which one was it? A. I think the first time that it was ever used was in answer to a proposal of the Tennessee Valley Authority for a quantity of cement, part of which was for Coal Creek, Tenn., and part of which was for Sheffield, Ala.

[10] Part III A 3, *supra*, pp. 627-28.

[11] As to Bonneville: see Part XVII, p. 2713 (West Coast).
As to TVA: see Part IV F, *infra*, pp. 982, 991.

Q. To the best of your knowledge, that is the first time that any one of these four companies used that method of bidding to the United States Government; is that so? A. To the best of my knowledge, it is the first time that any one ever used it.

Q. Why do you say that? A. Because I haven't found anybody else using it prior to that time, and we devised it in my office.

Q. Oh, you say that the method of bidding a so-called destination cost to the U. S. Government with control clause was devised in your office; is that it? A. That is true.

Q. Did you personally have something to do with it? A. Yes, I did, together with one or two other men in our Chicago organization.

Q. I think you stated that you have general charge of the price policies of the company? A. Generally speaking, yes.

Q. Well, why did you devise this method of bidding? What was your aim? What was the purpose to be served by this method of bidding? A. We wanted to sell cement at our mills, or offer to sell cement at our mills to the United States Government when they asked for mill prices, and we were interested in bidding on the particular quantity of cement involved, and because we felt that this method of bidding gave us the best chance to do a profitable business with the Government, or to do as profitable business with the Government as competition would allow us to do on sales at the mill.

Q. Did you at the same time have the practice of quoting a flat mill price to the U. S. Government? A. I do not believe at any time that we have ever engaged in such practice, any of these four companies ever bid flat mill prices. You mean what I would call an inflexible mill price?

Q. I mean a price f.o.b. your mill without regard to the destination to which the particular cement is to be taken. A. I do not believe any of these four companies have ever so bid.

Q. Your quotation in this new form then described as cost to the U. S. Government with control clause was a way of bidding with relation to cost at destination; is that correct? Is that what the term

implies? A. Well, it implies that we selected a cost of our particular brand of cement for the work required at the destinations involved, and in our bids said to the Government in order to determine the price at our mill you shall deduct the land grant, special, or commercial freight rate, whichever is lowest, in order to arrive at a price at our mill for shipment on federal bills to the destination stated above. That may not be the exact language, but I am sure that is the sense of it.

Q. And we had spoken of so-called control clause, which part of that descriptive method of competing that you have told us would be the so-called control clause, if any? A. Well, the part that has come to be known, at least in this proceeding, as the control clause is the part that states the Government shall make the deductions from the above named destination cost to the United States Government in order to reach a price at our mill."[1]

He testified further on cross-examination with respect to the working out and filing of the control clause as follows:

"Q. Well, now, who assisted you in working out or devising this control clause? A. Mr. J. B. Johnson, in my Chicago office, and Mr. A. E. Hjerpe.

Q. Did you discuss it with any one other than them before you finally worked it out in final form? A. I feel quite sure we did not.

Q. You immediately, I take it, upon working it out, filed it with the Code Authority; is that correct? A. That is correct.

Q. And gave notice thereby of your intention to use that on bids thereafter to which it might be applicable? A. Gave notice thereby of our intention to use it on this particular letting.

Q. In other words, you filed it for a particular letting only; is that the way it started? A. I rather think that is correct.

Q. And that particular letting was the first bids on T.V.A.? A. That is my recollection of it.

Q. And your bids on that occasion, with the control clause, were effective only on five days, five days

[1] (R) Tr. 47592-95.

after filing; is that correct? A. As I recall, the provision of the Code was that you could not use it until after they had been on file for five days.

Q. And in other words, your use of the control clause, you gave five days' notice of that through the Code Authority? A. Well, we did not give notice ourselves at all. We filed as provided in the Code of Fair Competition, the price quotation that we intended to use."[2]

He explained as follows the difference in his company's practice prior to the use of the control clause and the relation of the clause to bidding destination costs to the United States Government so as to permit the Government to enjoy and use land grant rates:

"Q. Have you ever quoted a so-called destination cost to the U. S. Government without some such control clause? A. Yes, prior to NRA days it was our practice to quote a mill price for shipment to a particular piece of work at a particular destination which we determined by making a deduction that during the NRA we concluded the Government should make and provided for that being done.

Q. I understand by the answer you have just given that there was a time when you bid some form of mill price. You had previously told us that the new method devised by the Signal Mountain Company in 1934 was called U. S. destination cost, and I would like to know whether you ever bid under that new method without a so-called control clause? A. Not to my knowledge, no.

Q. Is there some significance to the control clause that ties it inseparably to the destination cost? A. Yes, it does, because without the so-called control clause I assume that the destination cost to the United States Government that is stated might be taken for a destination price, the price on delivered cement.

Trial Examiner Norwood: Wasn't that the price on delivered cement?

[2] (R) Tr. 47606-07.

The Witness: Ordinarily not, your Honor, no.

Trial Examiner Norwood: Why not?

The Witness: The price of delivered cement would be predicated on our company making delivery of it to that destination at commercial rates. The destination cost to the United States Government would ordinarily be a lower figure than that because it takes into consideration the ability of the Government to enjoy and use land-grant rates.'"[8]

He testified further that this method of bidding was an f.o.b. mill price and not a destination price:

"Q. I was trying to get a simple statement of your point of view with regard to this method of bidding devised in 1934. If we take your general price policy of quoting delivered prices, and then consider that another type of price is a mill price, which you say your company quoted occasionally prior to the Code, is this new method the cost to the U. S. Government with control clause still a third type of price or does it fall in one or the other of those two general classes of destination price on the one hand and f.o.b. mill price on the other? A. No, it is an f.o.b. mill price.

Q. I see.

Cross examination by Mr. Wooden:

Q. Mr. Storey, this control clause you were just describing, and you said it was an f.o.b. mill price, that it was an f.o.b. mill price that was tied into a destination cost by the control clause wasn't it? A. Mr. Wooden, I would say that you would have to take the whole destination cost to the United States Government together, and that the control clause is a part of that method of quoting and that in its use we say to the United States Government the price at our mill for your shipment on federal bills of lading to this project, and to this particular destination, is a certain number of dollars and cents, less what you

[8] (R) Tr. 47395-96.

determine it costs you to get it there by the cheapest rate available to you.'"[4]

He testified that actual rather than estimated land grant rate figures are used in this method of bidding and explained the differences in computations of such rates and resulting loss of business which led to the development of the clause:

"Q. And you were estimating in advance what that rate would be in the destination cost that you figure? A. No, I would not say that we were estimating what it would be.

Q. Well, you did not know in advance what the actual settlement rate would be between the Government and the railroad on the cement, did you? A. Only what the railroad told us, yes.

Q. Wasn't that an estimate rather than an actuality in many cases? A. Not as I see it; no, sir.

Q. It was not your experience that many times the actual basis of the settlement with the railroad was a different figure than the one you used in making your destination cost estimate or bid? A. Well, whether it was actual or whether it was not the amount used in the settlement, it might not have anything to do at all with the figure we use for a destination cost.

Q. Well, wasn't it your experience that frequently the actual or the—rather, I will put it this way: That frequently the rate that you used in your bid was not the actual rate on which settlement was made between the railroad and the Government? A. We do not use any rate in our bid, Mr. Wooden.

Q. Well, what factor did you use to get the delivery cost in that destination cost? A. We used anything that we could gather together in the way of information on past bids to the Government on the amount of money that our competitors appeared to be trying to net at their mills on sales in the general vicinity, which has been referred to as a base, or price basis.

[4] (R) Tr. 47596-97.

Q. Well, you did attempt to estimate what the land-grant rate or special rate would be, didn't you, from the applicable basing point to the destination involved? A. No, I don't think so. We asked the railroad what it was and used the information they gave us.

Q. And you found in some instances, though, that information furnished by the railroad was not actually the rate on which the shipment moved and on which settlement was made, didn't you? A. Well, we, of course, have found that there has been a difference of—conclusion between the railroads and various departments of the United States Government as to what land-grant rate actually applied. Yes, we have found that.

Q. And you have sometimes found that the actual settlement rate was sometimes higher and sometimes lower than the one that you had learned from the railroads at the time you made your bid; is that correct? A. Yes, frequently the Government would use rates that were either higher or lower than the rates given to us by the railroads.

Q. What were the conditions that you had experienced before devising this control clause and which you sought to remedy by the use of the control clause?

* * *

A. Well, I would say primarily the differences between the railroads and the Government as to the settlement rate, land-grant rate, which would frequently result in our losing a chance at a piece of business that we had determined we were going to have a chance at.

Q. In other words, you frequently found under those prior conditions your destination price or destination bid was high? A. No, I would not say that. We would find that our destination price, our price on delivered cement, was just what we had quoted the Government because there was not any uncertainty about the commercial rates. We would find that our mill price, to which might be added the rate on which a settlement, as you put it, was made by the

Government would preclude consideration for our company on a valuable piece of business with the Government.

Q. Well, do you mean by 'precluding consideration,' that your destination bid, or the equivalent of your destination bid would be higher than that of others? A. No, destination bid has not anything to do with it, as I see it.

Q. Or the destination cost to the Government figured on your bid would be higher than that of some of your competitors? A. Well, in those days, of course, there was no such thing as a destination cost as we conceived it.

Trial Examiner Norwood: Why did you lose the business?

By Mr. Wooden:

Q. That is what I am getting at. A. Because the ultimate cost of our cement purchased at our mill laid down by the Government where they wanted to use it would be higher than we intended that cost to be.

Trial Examiner Norwood: And higher than the other fellow had bid?

The Witness: No, higher than we intended our price to be, your Honor.

Trial Examiner Norwood: Well, would that make any difference if there was not another bid that figured out lower?

The Witness: Oh, no, it would not make any difference if that was the low bid.

By Mr. Wooden:

Q. As a matter of fact, you frequently found——

Trial Examiner Norwood: I am assuming that that was not the lower bid.

The Witness: That is true, or we would not have been precluded from——

Trial Examiner Norwood: And isn't that why you lost the business?

The Witness: Because it was not the low bid?

Trial Examiner Norwood: Yes.

The Witness: The reason we lost the business was because the bid at our mill plus the land-grant rate used by the Government would not give them as low cost on our cement as somebody else's cement.

Trial Examiner Norwood: That is what I am trying to get at.

Go ahead.

By Mr. Wooden:

Q. And this control clause was devised to meet that condition, as I understand it? A. Oh, the control clause was devised so that we might know what the cost of our own cement on which we were willing to make a proposal to sell at our mill might be laid down by the Government where they wanted to use it. We wanted to know what our cement cost the Government because we were in competition with other sellers, and that is the basis on which the Government made their awards."[5]

b. Code Authority Action: Dissemination of Control Clause

[On April 3, 1935 Professor Burns wrote to Reiter, Chairman of the Code Authority, stating that he had noticed in looking through the Code Authority's letters and interpretations that the "availability of the land grant and special rates seems to have (given) rise to a good deal of difficulty in applying the open price clause of the Code." He then made various inquiries concerning the Code Authority's interpretations involving prices to the Government where land grant rates were involved.][1]

[Reiter replied to Professor Burns by letter dated April 11, 1935 in which he explained "Destination Costs to the United States Government", the availability of land grant information, violations of the Code which had occurred in connection with bids involving such rates and the origin of

[5] (R) Tr. 47597-602.

[1] Com. Ex. 277 G-H.

the control clause. Pertinent portions of Reiter's letter are as follows:

[Italicized part quoted in Fdgs. Par. Eight (k)]

"Your understanding of Destination Costs to the U. S. Government substantially conforms to our own. For a short time, at our request and covering only a few instances, the United States War Department when calling for bids included in their proposal the exact land grant rates from various points of origin to destination where cement was required and stated in the proposal that these land grant rates would be used in canvassing bids. In all other cases exact land grant rates are known only to the Government and in response to requests from this office the Government has refused to disclose such land grant rates.

Therefore, of necessity when figuring a Destination Cost to the U. S. Government a Member of the Industry uses an estimated land grant rate as determined by his own Traffic Department in conjunction with railroads themselves. Such estimated land grant rates ordinarily vary from the actual only by a small fraction of a cent per hundred pounds.

Under the open price provisions of our Code interested competitors have knowledge of such Government Destination Costs filed with us and may meet them if they care to do so, thus making it possible for all interested Members of this Industry to bid on a parity. A control clause usually in the form of that quoted in our General Letter of October 5, 1934, requires the Government to deduct the actual land grant rate from the Government Destination Cost bid and thus in effect continues the parity as between derived prices f.o.b. mill. If a Member bidding quotes in figures a land grant rate which may be deducted from the Government Destination Cost bid in order to determine the mill price, this land grant rate quoted is of necessity an estimated one and if incorrect does in our opinion amount to the quotation of a price f.o.b. mill not filed with the Code Authority.

You will understand that Government Destination Costs for any destination as filed by Members of this Industry are lower than the commercial price f.o.b. that destination as filed by these same Members. A Government Destination Cost is filed and bid in lieu of a mill price and for these two reasons we believe it to be a violation of the Code for a Member to bid a Government Destination Cost as a destination price, for in this case the cement company will be required by the government to make delivery without the use of Federal bills of lading at destination in contravention to their own filing. The comment in our General Letter of November 19, 1934, indicating our opinion that a Member of this Industry was in violation of the Code if he allowed a deduction of commercial freight rate to determine the price f.o.b. mill at which cement may be shipped on Federal bills of lading was also based on the opinion that such bid would be in effect a quotation f.o.b. mill not filed with the Code Authority in conformity with the requirements of our Code.

As a final comment upon the filing and bidding of Government Destination Costs, you have correctly deduced the fact that the importance of this matter has arisen through sincere efforts by Members of this Industry to secure to the Government the full advantage of land grant or special rates available only to them and an equal effort to avoid a violation of the open price provisions of our Code. As has been stated in several of our General Letters and in other correspondence with members, the Code Authority did not invent the device of a Government Destination Cost but it was designed by a Member or Members of this Industry to meet the two requirements above mentioned and when tendered as a filing to the Code Authority was accepted by us as a proper filing.

It is a lamentable fact that several Members of this Industry have in our opinion violated the Code in attempts to bid upon proposal forms issued by various branches of the U. S. Government, although in most of these cases there was no intent on the part of the Member to violate the Code. In certain cases

also branches of the U. S. Government have attempted (probably through misunderstanding) to secure to the Government a lower price f.o.b. mill or destination than was intended by the bidder as evidenced by his filing and a few of such attempts have been successful. Each such occasion usually results in a charge of violation of the Code, but when the Code Authority has found that such violation has occurred and referred the matter to NRA for enforcement, no corrective action has been taken."][2]

[Italicized part quoted in Fdgs. Par. Eight (j)]

[The first interpretation (No. 16) by the Code Authority in connection with quotations to the United States Government where land grant rates were involved was issued on December 23, 1933 and stated that it was the intent of the Code "*that the United States Government may be quoted with the use of land grant rates in exact accordance with the prevailing practice prior to the adoption of this Code.*"][3]

[On February 9, 1934 Newlands of Oregon wired the Code Authority inquiring as to the meaning of Interpretation No. 16, its application to a situation where a manufacturer was not situated on a land grant railroad and whether his company could quote the government at prices sufficiently lower in order to equalize the advantages of competitors located on land grant railroads.[4] The Code Authority replied by telegram on February 19, 1934 in part as follows:

"RETEL OUR INTERPRETATION SIXTEEN ASSUMES COMPETITIVE PRICE DESTINATION FROM ALL MEMBERS OF THE INDUSTRY BIDDING WHEN LAND GRANT RATES ARE USED THOUGH AM NOT SURE LAND GRANT DESTINATION PRICE TO GOVERNMENT CORRECTLY FIGURED BY YOUR DESCRIPTION STOP LAND GRANT PROCEDURE NOW RECEIVING OUR CONSIDERATION AND HOPE TO BE able TO GIVE MORE DEFINITE PROCEDURE SOON STOP * * *"][5]

[2] Com. Ex. 277 K-L.

[3] Com. Ex. 716 A.

[4] Com. Ex. 753 A.

[5] Com. Ex. 753 B.

[On March 2, 1934 the Code Authority addressed a General Letter to the industry explaining that sales to the government with land grant rates were made on the basis of destination costs, so that Federal bills of lading might be used and that destination costs to the government should be filed like other prices. The letter then said:

> "Quotations to the United States Government at bidder's mill on the basis of such 'destination costs' shall be determined by subtracting from such 'destination costs to the Government' the land grant rate from bidder's mill to destination, or where there is no land grant rate, by subtracting the actual commercial freight rate from bidder's mill to destination."][6]

[Reiter, Chairman, testified that the Code Authority had requests from members for advice as to all filed prices which might affect a letting, and that in answering they treated the government destination costs as prices amounting to f.o.b. mill prices.[7] He testified further that the Code Authority did not initiate the government destination cost matter but that it was filed with them by a member. The Code Authority determined that the filing was a proper one whereupon it became necessary to explain it to the industry.[8]

(Other evidence relating to the dissemination of filed destination costs by the Code Authority is discussed under Part III E, *supra*, p. 671.)]

[On March 12, 1934 the Code Authority wrote an explanation of its letter of March 2, 1934 to the General Sales Manager of Southwestern in response to the latter's inquiry and to correct Southwestern's misunderstanding. The Code Authority said in part:

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[6] Com. Ex. 716 B.

[7] (C) Tr. 3144-45.

[8] (C) Tr. 3340-42.

"The only difference between figuring a destination cost to the United States Government and a commercial price at the same destinations (is) that land grant rates are used in the first computation and commercial freight rates are used in the second."][9]

[On March 29, 1934 the Code Authority issued a General Letter to the industry concerning the misinterpretation of its letter of March 2, 1934. It emphasized the mandatory requirements of the Code concerning price filing and stated that the letter of March 2, 1934 was intended to avoid violations of the Code and secure compliance particularly in the filing of destination costs. Concerning treatment of the United States as a buyer in a class by itself this letter said:

"Some confusion appears to have developed due to *misinterpretations* or *misapplication* of our GENERAL LETTER TO THE MEMBERS OF THE INDUSTRY, dated *March 2*, 1934, under the caption, 'DESTINATION COSTS TO U. S. GOVERNMENT'. It should be borne in mind that the *U. S. Government* is a buyer *in a class by itself*. It is the *only* cement buyer that can avail itself of land grant rates which apply to the movement of Government traffic over the land grant railroads. Under the second paragraph of Article XI of the Cement Code, it is required that no member of the Industry shall discriminate in its prices, terms and conditions of sale at the same time and place of delivery, *between purchasers or users* of cement *in the same class*. Therefore, whereas no member of the Industry can, under this provision make two prices to the U. S. Government at the same time and place of delivery, it does not prohibit a different price for the same time and place of delivery *for other purchasers or users* of cement *in another class*. Hence, a price quoted (within the requirements of the Code) by a member *to the U. S. Government cannot be assumed* to be the commercial price of the bidder and, therefore, applicable to all or any other classes of buyers."][10]

[9] Com. Ex. 753 C.

[10] Com. Ex. 716 C-D.

[Reiter testified that the misinterpretation which was sought to be corrected by the letter of March 29, 1934 was that manufacturers thought they could bid to the United States without filing prices for their bids f.o.b. mill and that this caused considerable confusion.][11]

[On April 14 and 23, 1934 the Code Authority superseded its letter of March 2, 1934 and made some changes in its original terminology.][12]

[Relative to the foregoing letters of the Code Authority and procedures on quotations to the government, there was an undated memorandum in the files of Nazareth which read in part:

> "In view of the Code Authority's letter to all members of the Industry re Destination Costs to U. S. Government, dated April 14th, I believe it advisable to set forth method that we should employ with respect to determining and filing Destination Costs and quoting to the U. S. Government in instances where Land Grant Rates are involved.
>
> 1. Code Authority letter of April 23rd reaffirms the advice in its letter of March 2nd, that 'Destination Costs to the U. S. Government,' should be filed with the Code Authority where Land Grant Rates are a factor.]
>
> 2. Code Authority letter of April 23rd should be interpreted to mean that we should determine Destination Costs to the U. S. Government in the same manner as that used by us in determining commercial prices, except that, using the best information available, Land Grant Rates are to be considered in addition to commercial rates."

[The memorandum further distinguished between the quotation of filed commercial prices when the government requested destination prices, and the quotation of filed destination costs where mill prices were requested.][13]

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[11] (C) Tr. 3342-43, 3345.

[12] Com. Ex. 716 E-F.

[13] Com. Ex. 717 A-B.

On May 25, 1934 the Code Authority wrote to the President of National in connection with a complaint that it had violated the price filing requirements of the Code on its bid to TVA of April 23, 1934 on 3,000 barrels of cement. The letter explained the necessity for filing government destination costs and said in part:

[Italicized part quoted in Fdgs. Par. Eight (k)]

"Where government destination cost only is filed, it may be bid with some controlling clause such as the following, which has been filed with us by one member of this Industry and seems to cover the situation:

'The U. S. Government shall determine its cost f.o.b. cars—for invoicing purposes on U. S. Government bills of lading to the above named destination only, by subtracting from the above mentioned destination cost to the U. S. Government the land grant rate as determined by the U. S. government as being applicable from—to said destination, the actual commercial freight rate or special U. S. Government rate from—to destination named, whichever rate is the lowest'." (Com. Ex. 558 C)]

[On the same date the Code Authority wrote to Coogan, Vice President of Alpha concerning complaints for violation of code filing requirements on a letting at Monroe, Louisiana, and set forth the form of control clause that should be used on destination cost bids. The letter said with respect to the Code Authority's efforts to have the Government include applicable land grant rates in its invitations:

"The Code Authority has had some success in having the Government include in certain recent proposals for cement the actual land grant rates applicable from probable shipping points to destination. The most recent proposals for the Bonneville, Oregon, Dam and for the Fort Peck project at Wiota, Montana, carry such land grant rates. The Code Au-

thority does not believe that lacking correct land grant rates a member of this Industry can meet a Government destination cost filed with the Code Authority by bidding a mill price, and it is for this reason that we suggest that where Government destination cost only is filed, such destination cost should be met in order to avoid violation of the Code."]

[The letter then said that a control clause "should be used" such as had been filed with the Code Authority by a member of the industry and a copy was set forth.][14]

Reiter, of the Code Authority, testified that this was done because if the government destination cost was filed with a control clause and bid without it, then the bid did not comply with the Code.][15]

[On June 19, 1934 the Code Authority issued a further letter giving instructions as to the method of filing government destination costs in order to facilitate the work of the Code Authority and to prevent errors. The contents of this letter have been summarized in Part III C, *supra*, p. 647.]

On the Grand Coulee Dam letting of February 21, 1935 by the Bureau of Reclamation various West Coast companies submitted destinations cost bids with the control clause. (See Part XVII, *infra*, p. 2721.) The Secretary of the Interior felt that the clause would deprive the government of the advantage of the land grant rate and requested a decision from the Comptroller General as to whether or not funds for the project might properly be charged. The Comptroller General replied on March 23, 1935 that in his opinion the funds could not be charged.[16]

[In January and February, 1937, the Comptroller General reversed his opinion and on July 1, 1937 he handed down Decision No. A-86146 holding that there was "no ob-

[14] Com. Ex. 840 I-J.

[15] (C) Tr. 3711.

[16] (C) Tr. 161-65.

jection to the submission and consideration of bids containing the control clause.'']"[17]

[Rice, Attorney in the War Department, testified that he did not follow the Comptroller General's opinion of March 1935 because he could not defer purchases and had to get the material as best he could.[18] On the basis of the Comptroller General's opinion The Bureau of Reclamation rejected the bids on the Grand Coulee letting of February 21, 1935. Shortly thereafter the Code Authority, in response to an inquiry from one of the bidders said that the Comptroller General had not had a correct statement of the facts before him and that it was referring the opinion to its counsel for guidance (Part XVII, *infra*, pp. 2721-22).]

[Thereafter, on May 27, 1935, the day on which the Schechter decision was handed down, the Code Authority notified the industry of the filing and acceptance of a new control clause, the terms of which were set forth. The letter explained that the new clause was apparently the result of further consideration of the proper method of bidding to the government with due consideration to the opinion of the Comptroller General of March 23, 1935.[19] On the same day the Chairman of the Code Authority wrote to the Bureau of Reclamation setting forth the contents of its letters to the industry and said that the method of bidding which it described was satisfactory to some other governmental departments and requested the Bureau's opinion thereon.][20]

[On June 7, 1935 the Assistant Chief Engineer of the Bureau of Reclamation replied that he did not believe that the changes which had been made in the former control clause would remove the Comptroller General's objections "as the essential meaning and effect of the clause is the

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[17] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 166-67, 176-77, 180-84.

[18] (C) Tr. 1451-53.

[19] Com. Ex. 548-3 B.

[20] Com. Ex. 919 N.

same as before.'"[21] In the interim between May 27, 1935 and June 7, 1935 the Code Authority had ceased to function and the Trade Practice Committee had undertaken to function in its place so far as was legally possible (Part III I, *supra*, p. 692). On June 14, 1935 Neylan, Vice President of Lone Star, wrote to Reiter, acknowledging receipt of a copy of the letter of the Bureau of Reclamation dated June 7, 1935, and expressed regret over the outcome. He suggested that the matter should be given consideration at the next meeting of the Trade Practice Committee.[22] Reiter, as Chairman of the Trade Practice Committee, replied that the matter would be scheduled for discussion at the meeting of the Trade Practice Committee on June 25.'"[23] The record does not disclose that a meeting was held on that date and the minutes of the next meeting held on July 9, 1935 contain no reference thereto.][24]

3. Respondents Not Using Control Clause

Evidence has been set forth previously to show that there were sixteen respondents to whom land grant rates were not available and who made no shipments involving such rates, and five other respondents who had very little contact with such rates.[1] In addition executives of the following respondents testified that they had never used the control clause in bidding where land grant rates were involved or had never heard of it until the institution of this case:[2]

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[21] Com. Ex. 919 M.

[22] Com. Ex. 919 L.

[23] Com. Ex. 919 K.

[24] Com. Ex. 591 A-E.

[1] *Supra*, p. 763.

[2] Bessemer: Warren, F. B., Vice President (R) Tr. 32173-74.
Federal: Bates, J. E., Sales Manager (R) Tr. 30625.
Green Bag of W. Va.: Wood, General Manager (R) Tr. 29525.
Hercules: Brobston, President (R) Tr. 26174.
Nazareth: Robeson, Vice President (R) Tr. 28047.
Nebraska: Hoenig, Sales Manager (R) Tr. 42052-53.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35913.

Bessemer
Federal
Green Bag of West Virginia
Hercules
Nazareth
Nebraska
Wolverine

Executives of Southwestern [El Paso], Marquette and Northwestern States testified that they had used such a clause once or on but few occasions.[3]

4. Respondents Using Control Clause

Executives of the following respondents testified that they had quoted destination costs on sales to the government with the use of the control clause during the NRA Code period:

Alpha
Arkansas
Consolidated
Cumberland
Dewey
Florida
Hermitage
Lehigh
Lone Star
Missouri
Monarch
National
Oklahoma
Penn-Dixie
Signal Mountain
Southern States
Southwestern (El Paso)
Trinity
Universal Atlas

These witnesses (except Storey whose testimony is set forth at p. 821) testified, in substance, that they learned of the control clause as a result of its dissemination by the Code Authority, that they commenced using it after such

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[3] Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 39012-13, 39366.
Marquette: Colburn, Vice President (R) Tr. 39977-80.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36564-66.

notification and that such usage was not the result of any agreement or discussion with their competitors.[1]

Executives of various respondents testified that they did not consider that they were obliged to employ the control clause or any particular method of bidding on sales to the federal government.[2]

A government purchasing official testified that on the same letting there are some bids which contain the clause and others which do not.[3] Colburn, Vice President of Mar-

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[1] Alpha: Coogan, Vice President (R) Tr. 24197-202.
Fellows, Sales Manager (R) Tr. 25802.
Arkansas: Thompson, Sales Manager (R) Tr. 46535-36.
Consolidated: Storey, President (R) Tr. 47592-606.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39858.
Dewey: Moore, R. W., Vice President (R) Tr. 47020-23, 47327-28.
Florida: Storey, Vice President (R) Tr. 47592-606.
Hermitage: McGovern, Sales Manager (R) Tr. 36319.
Lehigh: Bowen, Vice President (R) Tr. 27071-73, 27076, 27085, 27098-100.
Lone Star: Koch, Vice President (R) Tr. 32715-22, 32724.
Missouri: Alexander, President (R) Tr. 37129.
Monarch: Brooke, Vice President (R) Tr. 42336-37, 42402-07.
National: Dannelly, Vice President (R) Tr. 39651-52.
Oklahoma: Thompson, Sales Manager (R) Tr. 46535-36.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38441-44.
Signal Mountain: Storey, Vice President (R) Tr. 47592-606.
Southern States: Elcock, Vice President (R) Tr. 37577-78.
Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 39012-13.
Trinity: Storey, Vice President (R) Tr. 47592-606.
Universal Atlas: Sutherland, Asst. to Vice President (R) Tr. 35560-61.

[2] Dewey: Moore, R. W., Vice President (R) Tr. 47022-23.
Missouri: Alexander, President (R) Tr. 37129.
Monarch: Brooke, Vice President (R) Tr. 42337.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36564-66.

[3] Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1257.

quette, testified that sometimes he used the clause and at other times when he might have used it he did not do so.[4]

5. Reasons for Use of Control Clause

The reasons contained in the testimony of executives of various respondents who used the clause may be summarized as follows:

Difficulty in securing accurate information on land grant rates due to increasing lettings where such rates were involved.

To avoid computing land grant rates and differences with government officials as to the correctness of such computations which resulted in violations of the code when filing f.o.b. mill prices.

Convenience in giving the government the benefit of land grant rates without the five day delay required after filing of f.o.b. mill price.

Because competitors were using the clause and in an effort to meet the lowest price at destination.

Convenience in meeting prices filed with the use of the control clause.

Not to arrive at identical prices.[1]

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[4] (R) Tr. 39978.
Consolidated, Florida, Signal Mountain, Trinity: Storey, Vice President (except President of Consolidated) (R) Tr. 47595-602.

[1] Dewey: Moore, R. W., Vice President (R) Tr. 47020-23, 47396, 47410-11, 47420-23.
Lehigh: Bowen, Vice President (R) Tr. 27071-73, 27098-100.
Lone Star: Koch, Vice President (R) Tr. 32728-29, 33232-34.
Monarch: Brooke, Vice President (R) Tr. 42402-08.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38443.
Universal Atlas: Reiter, Vice President (C) Tr. 3356.
Com. Ex. 277 K-L (*supra*, p. 829 *et seq.*): Letter, Reiter, Chairman of Code Authority to Professor Burns.
See evidence as to Code violations in price filing on Bonneville Dam letting (Part XVII, *infra*, pp. 3713-21) and on TVA letting of March 1934 (Part IV F, *infra*, pp. 983-84).

6. Post-Code Use of Control Clause

Executives of some twelve respondents testified that they used the control clause after the NRA Code period although not consistently. Many of them used it only from time to time depending upon the trend among their competitors. Others testified that they used it on but few occasions. The total extent of the use of the clause in the post-code period, in response to invitations to bid which are in evidence, is shown in the digest of the evidence relative to alternate invitations and f.o.b. mill invitations and bids (Part IV E 5 c-d, *infra*, pp. 933-43 *et seq.*).

The companies who used the clause after the code period with summaries of the testimony of their executives concerning such usage are as follows:

Alpha—continued after open price filing ceased, but not at the present time. Last use latter part of 1938; now uses equalization clause furnished by Department of Agriculture in its invitations to bid.[1]

Arkansas and Oklahoma—continued for some time after code; began bidding "flat" f.o.b. mill very recently.[2]

Cumberland—sometimes and probably since the complaint herein depending on what it found other companies were doing.[3]

Hermitage—until sometime after the code; since then has bid on different occasions with or without the clause for the purpose of meeting competition.[4]

Lehigh—on some occasions but not in the last year due to increased resistance by Government departments and rejection of bids.[5]

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[1] Coogan, Vice President, Alpha (R) Tr. 24201-23, 24411-13.

[2] Thompson, Sales Manager, Arkansas and Oklahoma (R) Tr. 46533-34.

[3] Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39919-20.

[4] McGovern, Sales Manager, Hermitage (R) Tr. 36319-24, 36353-56.

[5] Bowen, Vice President, Lehigh (R) Tr. 27085-86, 27074-76.

Lone Star—very rarely at present.[6]

Monarch—continued after N.R.A.[7]

National—continued after code period where it finds a trend among competitors to quote destination cost rather than mill prices.[8]

Penn-Dixie—at times after code but not always.[9]

Southern States—sometimes, depending on how it figured a way to secure business.[10]

Southwestern (El Paso)—abandoned using control clause prior to July, 1937.[11]

In connection with Lehigh's post-code use and abandonment of the control clause Bowen, Vice President, testified that the clause was discontinued due to increasing resistance thereto by government purchasing officials and rejection of some of his company's bids which contained the clause. Upon discontinuing Lehigh reverted to its pre-code practice of bidding f.o.b. mill prices where land grant rates were involved. It then found that the same situation which originally had led to its adoption of the clause arose anew, that is, that due to differences in computation of land grant rates by the government it was losing business and awards were being made to competitors who continued to use the control clause. This condition led to its readoption of the clause. Eventually, late in 1938 or early in 1939, Lehigh abandoned use of the clause altogether.[12] Lehigh had no agreement or understanding with its competitors with respect either to the use or the abandonment of the clause. Bowen's testimony follows:

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[6] Koch, Vice President, Lone Star (R) Tr. 32724.

[7] Brooke, Vice President, Monarch (R) Tr. 42404-07.

[8] Danielly, Vice President, National (R) Tr. 39654-56.

[9] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38443-44.

[10] Elcock, Vice President, Southern States (R) Tr. 37579-80.

[11] Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 39013.

[12] Bowen, Vice President, Lehigh (R) Tr. 27075-76, 27099-106.

"Q. What has been your observation? What are the factors which led to Lehigh not obtaining this business on its f.o.b. mill bids, which you just described? A. I have observed many tabulations of such bids, and I found many cases in which we have quoted prices, f.o.b. mill prices, which we had calculated by taking into consideration the land-grant rates from our mill, and the possible competition based on land-grant rates from other mills, but the Government officer, in making his award, has used land-grant rates that differed from those that we had used, and believed to be correct, and placed the business with competitors quoting with the use of the control clause.

In short, we are now finding that the same factors which originally led us to use the control clauses are operating against us under our present method of bidding f.o.b. mill prices.

By Mr. Leisure:

Q. And your experience has been that you are or are not getting business, then? A. Getting very little, and for the past year our effort has been to try to find some method which would be acceptable to the Government buying officers, and which would still permit us to get some business.

Q. Now, referring to the control clause: Did you, Mr. Bowen, ever have any agreement or understanding with your competitors with respect to the use of ceasing to use, with respect to this clause? A. No, none whatsoever."[18]

He testified further:

"Q. Do you mean to say that it was the same notwithstanding the fact you used a control clause after the code and under the code, and did not use one before? A. What I meant to say—perhaps I was not as clear as I should have been—is that when we discontinued it, the use of the control clause, we reverted back——

Q. When was that, by the way? A. Oh——

Trial Examiner Norwood: Let him finish.

[18] (R) Tr. 27075-76.

A. —late in 1938 or early in 1939.

By Mr. Wooden:

Q. All right. Go ahead. A. We then reverted back in figuring our f.o.b. mill prices to the method that we had used before there was a code and before we used the control clause."[14]

Officials of government departments testified that they had received bids containing the control clause after the code period and after the date of the complaint herein:

Rice, Attorney in the War Department, said that he knew of no case where a bid did not contain the clause between the Comptroller General's opinions of March 1935 and December 1937.[15]

Fry, Purchasing Officer, of the Department of Interior, testified that substantially the same control clause which started in the code period was still in effect in December, 1937.[16]

7. Operation of Control Clause; Effect on Land Grant Benefits

a. Generally

The evidence has been set forth separately concerning the various methods used by respondents in their price computations where land grant rates were involved other than in cases where they bid destination costs with the use of the control clause.[1]

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[14] (R) Tr. 27101-02.

[15] (C) Tr. 1448-50.

[As already shown (*supra*, p. 837) the Comptroller General's opinion of March 1935 held that the use of the control clause would deprive the Government of the advantage of land grant rates. In his opinion of 1937, the Comptroller General reversed this position.]

[16] (C) Tr. 172-73.

[1] Part IV C, *supra*, p. 792 *et seq.*

The evidence relative to the control clause, which has already been digested[2] shows the following:

(1) Quotations of destination costs with the use of the control clause were treated, filed and disseminated by the Code Authority as f.o.b. mill prices;

(2) The control clause provided for the deduction of the lowest applicable land grant, special or commercial rate from the destination cost figure to arrive at the bidder's mill price; and

(3) The destination cost figure was computed through the use of the lowest available land grant rate.

The purpose of bidding destination costs with the control clause was to provide the government with a price which would permit it to take title at the mill,[3] and obtain the benefit of the land grant rate.[4] Government officials and executives of respondents agreed in their testimony that this method of bidding permitted title and delivery to be taken at the mill.[5] Custer, Senior Administration Assistant, Bureau of Supplies and Accounts, Navy Department, testified that when the Bureau of Supplies and Accounts accepts a bid containing the control clause there is no question that it is bound by it.[6] Their opinions differed as to whether or not it gave an f.o.b. mill price and

[2] Part IV D 1-2, *supra*, pp. 817-39.

[3] Bowen, Vice President, Lehigh (R) Tr. 27067-71.

[4] Id., Tr. 27071-72.
Moore, R. W., Vice President, Dewey (R) Tr. 47420-21.

[5] Rice, Attorney, U. S. War Dept. (C) Tr. 1719-25, 21357-58.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1293-94.
Ashley, Chief of the Division of Purchases, U. S. Dept. of Agriculture (C) Tr. 5475-76.
Bowen, *supra*, Tr. 27067-71.

[6] (C) Tr. 2566.

as to the extent of the land grant benefit which the government obtained.[7]

Executives of several respondents testified that the resulting price was an f.o.b. mill price or its equivalent.[8] It reverted back to a mill price although the figure might not have been the same as the bidder's mill base.[9] It permitted the government to deduct the applicable land grant or commercial rate in order to determine the f.o.b. mill price.[10] The control clause was related inseparably to the destination cost figure since otherwise the destination cost might have been taken for a delivered price.[11]

Government purchasing officials did not consider that the control clause provided a "firm" f.o.b. mill price because it contained stipulations as to how the government could secure the price at the mill. Holmes of the War Department testified that by "firm" he means one that does not require much calculation to compute the invoice price.[12] Rice, War Department Attorney, said that prices were inserted in the f.o.b. mill column of invitations with the clause attached but that in his opinion, it does not amount to an f.o.b. shipping point price.[13] Other officials

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[7] *Infra*, p. 856 *et seq.*

[8] Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47596.
Moore, R. W., Vice President, Dewey (R) Tr. 47400.
Bowen, Vice President, Lehigh (R) Tr. 27067-71.
Colburn, Vice President, Marquette (R) Tr. 39977.

[9] Fellows, Sales Manager, Alpha (R) Tr. 25914-16.

[10] Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46532-33; and see citations in footnote 2, p. 819, *supra*.

[11] Storey, *supra*, Tr. 47595-96.

[12] Holmes, W., Legal Advisor, Proc. Division, War Dept. (C) Tr. 2339-40, 2347-48.
Rice, Attorney, U. S. War Dept. (C) Tr. 21354-56.

[13] (C) Tr. 1533-38.

testified, however, that the transportation charge which was added to the mill figure under the control clause was based on the actual freight[14] and that the effect was that the government deducted "the freight which it is actually required to pay."[15] At the same time they said that their departments used estimated land grant rates in complying with the provision for deduction. They said that these rates were computed with the best information available and one witness could remember no case where a shipper made a claim because the estimated rate differed from the actual. Yet they testified that because of variations in computations the purpose of the control clause to bring into consideration the actual land grant rate was ineffective.[16]

Manufacturers generally used the same base price in quoting destination costs with the control clause that they used in quoting a commercial destination price, excepting when another mill had a lower land grant rate. The only difference between the two was the difference in amount between the commercial freight rate and the land grant rate used in computation of the destination cost figure.[17] In determining what the f.o.b. mill figure would be with use of the control clause the bidder took the lowest price which it figured could be made at the destination through the use of land grant rates and deducted the applicable land grant or commercial rate from its own mill. The land grant rate used in computing the destination cost figure was the lowest of any likely competitor even if a land grant rate was not applicable from the bidder's mill. Where a

[14] Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 2259-61.

[15] Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1262-63.

[16] Taylor, *supra*, Tr. 1279.
Hayghe, *supra*, Tr. 2463, 2266-67.

[17] Reiter, Chairman, Cement Code Auth. (C) Tr. 3458-59.
Moore, R. W., Vice President, Dewey (R) Tr. 47400-08.

more advantageous land grant rate applied from a competitor's mill the bidder's mill net was reduced to meet the lower resulting destination cost.[18]

The following excerpts from the testimony of Moore, Vice President of Dewey, and Sutherland, Assistant to the Vice President of Universal Atlas, describe their computations in bidding with the control clause:

Moore testified as follows:

> "Q. And where you used a control clause in connection with an f.o.b. mill how did you determine what the figure f.o.b. mill should be? A. By taking the lowest price we could find at destination and deducting from that, or the lowest—I will say or the lowest price we might figure would be made at destination by use of land-grant rates and deducting from that the rate from our mill to that destination.
>
> Q. Did you ever deduct the commercial freight rate from the destination price in order to get f.o.b. mill figure to bid to the Government? A. Yes, sir.
>
> Q. When did you do that? A. Well, whenever that was the rate we had to deduct in order to get a mill price.
>
> Q. In other words, there was no land-grant rate or special rate? A. Yes, sir.
>
> Q. Whenever there was a special or a land-grant rate then you did not deduct the commercial; is that correct? A. Do you mean from our mill where there was no special land-grant rate from our mill?
>
> Q. Well, answer it that way first, yes. A. That is correct.
>
> Q. Where there was no land-grant rate from the basing point which was involved in the particular destination price, then what did you deduct?
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> • • •
>
> A. Well, that is presuming that the destination price was affected by some mill base.

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[18] Moore, R. W., Vice President, Dewey (R) Tr. 47400-08.
Sutherland, Asst. to Vice President, Universal Atlas (R) Tr. 35529-33.
Colburn, Vice President, Marquette (R) Tr. 39980.

By Mr. Wooden:

Q. Yes. You don't say that the destination price is not affected by the mill base; do you? A. Yes, sir.

Q. No relation between the mill base and the destination price?

• • •

Q. But you have testified that in most cases it was correct, that there was a relation between the mill base and the delivered price, didn't you? A. Not as to this Government business that we are talking about now.

Q. Well, there is a relation, is there not, even on the government business by reason of the fact that you start with the delivered price and figure back from it, don't you, to find out what you quote f.o.b. mill? A. Well, we don't always figure back on Government business to a mill that has a base.

Q. How do you arrive at it then? A. Why, figure it back to some mill that has a land-grant rate that might control the destination cost.

Q. Do you mean some mill base with a land-grant rate that might control? A. No, I do not mean that at all. I mean that a mill does not have a base, can control the price.

Q. Do you mean to say that a mill that is not a base mill will control the destination price and has controlled destination prices to the Government because it had a land-grant rate? A. I am positive of that.

Q. In other words, it did not act as a non-base mil in making such quotations; is that correct? A. Well, there was not any question of it acting at all. It was a question of what we figured was the competition.

Q. Now, you testified on direct, didn't you, that you took the lowest land-grant rate into account; is that correct? I want to ask you from where, the lowest land-grant rate from where? A. Well, from any mill that we considered might be a competitor for the particular cement that was involved.

Q. Well, if you did not—if the destination involved happened to be one where you were applying

the freight rate to some base, you would not know what that other mill's mill price was would you?

By Mr. Wooden:

Q. That other non-base mill's price? A. Well, I can answer that in this way: Taking the destination price that we thought we would have to meet and deducting from that the land-grant rate—lowest land-grant rate—from some competing mill in that particular market, would give us a figure that we would have to meet, if we were going to quote for delivery at that same destination.

Q. But wouldn't you figure in that case back to some prevailing base price? A. No, it does not follow at all.

Trial Examiner Norwood: Do you mean you get this constant figure to which you would add freight to other points without knowing what base that was?

The Witness: It need not be a base, your Honor. It can be any mill with a land-grant rate whether it is basing mill or not, that would be competing at the particular destination.

By Mr. Wooden:

Q. Then, do you say that——

Trial Examiner Norwood: Do you ever get these figures from deducting freight unless it is a base mill?

The Witness: Oh, yes.

Trial Examiner Norwood: Get those constant figures.

The Witness: Well, it is not the same figure in every instance. It is a figure that varies with the deductions that you have to make,—land-grant deductions from the destination prices, which also—

Trial Examiner Norwood: Figure it back to a non-base mill, doesn't that make it a base?

The Witness: No; we just do that in trying to ascertain what competition we are going to meet.

By Mr. Wooden:

Q. Well, don't you expect that non-base mill to figure on the base mill's freight to prices? A. No. We are guided by the destination price.

By Mr. Wooden:

Q. Which I understand you to agree is ordinarily the equivalent of some base price plus freight. A. Well, that is quite generally what makes the destination price.

Q. And in the case of a Government bid at that destination, I understand you deduct the freight back until you get some constant figure? A. No, not from the same mill; we deduct the freight back to the mill that has the lowest land-grant rate, whether it is a base mill or not a mill with a base.

Q. Do you mean to say that it has been the Dewey Company's policy and practice to depart from the use of the basing-point plus freight in making bids to the Government? A. Well, our practice has been as I stated.

Q. Well, can't you tell me whether it has been your policy and practice to not use the basing-point method in bidding delivered prices to the Federal Government? A. Well, we started with the destination price and figured it out as I have said.

Q. Back to some base or back to any mill who has the lowest freight? A. It is figured back by the use of the lowest land-grant rate from any mill we figure will be competing for the business.

By Mr. Wooden:

Q. In other words, you make your bid not, you might say, to meet the competition of the base mill whose delivered price you started with but to meet the competition of some mill who had a lower freight rate than the base mill; is that right? A. We make our price as low as we figure that any other mill will make in quoting on that business regardless of whether it is a basing mill or non-basing mill.'"[19]

[19] (R) Tr. 47400-08.

Sutherland testified as follows:

> "Q. I would like to have you state, Mr. Sutherland, what you mean by your destination cost bid. A. I mean by the term 'destination cost,' that I offered to the Government to make this sale f.o.b. cars at mill.
>
> Q. How do you determine the price f.o.b. mill that you would charge the Government? A. The Government determines that under the terms of the so-called control clause attached to the bid in connection with the destination cost named, by subtracting from such destination cost the applicable rate * * * whether it be land-grant, special, or commercial, the lowest rate, I should have said—in order to arrive at its contract price f.o.b. cars our mill. * * *[20]
>
> * * *
>
> Q. Well, now, when you figure a destination cost, what process do you go through in so doing? A. Well, in the first place, I take our own price base and add to that the land-grant freight rate applicable from our mill to the destination in question. I then determine whether, from my past experience, I think I can get my price. If I find that I think I cannot, in finding out what my competition is among probable bidders, I take the price base, so-called, of all probable bidders on the inquiry, add to them the land-grant freight rate from their mills to the destination in question, and shrink my destination cost to be as low as the lowest figure the competition will force me to go."[21]

Sutherland then gave the following hypothetical illustration of the procedure followed by his company to meet the more advantageous land grant rate of a competitor and which resulted in the Government obtaining the benefit of a lesser mill net in addition to the benefit of the land grant rate:

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[20] (R) Tr. 35512.

[21] (R) Tr. 35529-30.

Mill	*A*	*B*	*C*	*D*	*E*	*F*	*G*
Land grant rate	.23	.29	.30	.18	.38	.26	.34
Price base	$1.60	1.70	1.40	1.50	1.75	(non-base)	1.35
Total	$1.83	1.99	1.70	1.68	2.13	—	1.69
Mill net necessary to meet competition of Mill D	$1.45	1.39	1.38		1.30	1.42	1.34

The witness explained that Mill A represented the mill of Universal Atlas and that each of the mills represented by the letters A to G was a base mill excepting Mill F. He said that in order to meet the lowest combination of land grant rate and price base represented by the $1.68 total of Mill D, it was necessary for the other mills to shrink their mill nets to the amounts indicated on the last line above which varied between one cent and 45 cents below their commercial mill nets [price bases]. He stated further that it was evident in the case of Mill A of Universal Atlas that since its mill net was 15 cents less than its price base, the government would obtain the benefit of the land grant rate from Mill A which would have to reduce its mill net.[22]

With respect to tie bids where land grant rates were involved, one government official testified that the trouble began with the control clause because before that time the government had a way to work it out provided the bidders gave shipping point quotations as well as destination quotations.[23] Another official could not say what percentage of identical bids contained the control clause.[24]

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[22] (R) Tr. 35530-33.

[23] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 230.

[24] Peoples, U. S. Director of Procurement (C) Tr. 10343-48.

b. Land Grant Benefit

With respect to the effect of the control clause on land grant savings to the government, respondents' executives and government purchasing officials alike testified that the destination cost figure and the actual laid-down cost at destination "always" are lower than the commercial destination price.[1] Rice, Attorney in the War Department, said this was because the destination cost with the control clause included "Some rate lower or else there was a cut on the proceeds to the mill. * * *"[2] Fry, Purchasing Officer in the Department of Interior, testified that the clause permitted the government to select the bid which would result in the lowest net available charge against public moneys.[3] Colburn, Vice-President of Marquette, testified that the clause always gave the government a better price at his company's mill than its filed f.o.b. mill price under the Code.[4]

Respondents' executives testified that they considered the control clause gave the government the benefit of the land grant rates.[5] At the same time they were interested in doing as profitable a business as was possible in consideration of their competition.[6] Witnesses from the government

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[1] Rice, Attorney, U. S, War Dept. (C) Tr. 1819-20.
Bowen, Vice President, Lehigh (R) Tr. 27071-72.
Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47595-96.

[2] (C) Tr. 1819-20.

[3] (C) Tr. 183.

[4] (R) Tr. 39980-81.

[5] Bowen, *supra*, Tr. 27071-72.
Coogan, Vice President, Alpha (R) Tr. 24199.
Moore, R. W., Vice President, Dewey (R) Tr. 47033-35, 47420-21.
Storey, *supra*, Tr. 47595-96.

[6] Id., Tr. 47592-95.

departments testified that in their estimation the clause ordinarily deprived the government of the full advantage of such rates, although there might be cases where it did not. Rice, Attorney, United States War Department, testified that the clause would not deprive the government of the benefit if the correct land grant rate was included in the destination cost figure.[7] They said that the extent to which the Government was deprived of benefit was indirect and measured by the difference between the destination cost figure and such figure as might have been obtained if the government was permitted to deduct the commercial freight rate from the commercial destination price and then add the applicable land grant or special rate.[8]

These government witnesses gave the following examples of how they considered the clause deprived the government of the full advantage:

Rice, Attorney, United States War Department, testified on the assumption that the destination cost bid to the government included the commercial freight rate. On that assumption he testified that if a bidder's commercial delivered price was $2.40 and the land grant was 20¢ as compared with a commercial rate of 40¢, it would indicate to him that the bidder contemplated a mill net of $2.00. When

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[7] Holmes, Legal Advisor, Proc. Division, War Dept. (C) Tr. 2335-40.
Rice, Attorney, U. S. War Dept. (C) Tr. 1731-33, 1448-50, 21354-57.
Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 1871-81.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1232-36.
Harkness, Florida State Procurement Officer, Pro. Div., U. S. Treas. Dept. (C) Tr. 4901-14.
Armstrong, Asst. Chief of Accounts, U. S. Bur. of Prisons (C) Tr. 2368-70.

[8] Rice, *supra*, Tr. 21358-59.
Hayghe, *supra*, Tr. 1871-87, 2179-94.
Harkness, *supra*, Tr. 4901-14.

asked how in such a situation the government would be deprived of any land grant rate his answer was as follows:

> "A. We have been deprived of competition to the extent we don't save anything by reason of the land grant rates.
>
> If the mill is satisfied with a $2.00 return to the mill and the railroad is satisfied with a 20-cent freight why shouldn't the cement be purchased at destination for a total cost to the Government of $2.20?"[9]

The hypothetical example cited by Rice is contrary to the testimony of Reiter, a Commission witness quoted in Par. seven (f) of the Findings as follows: *"The Government destination cost would be the lowest sum of any price base plus the applicable lowest rate available to the Government, whether land grant, special or commercial."*[10]

Hayghe, Chief of Traffic, Procurement Division, referred to six tabulations of bids at points in Alabama and Florida as instances of what he called additional amounts paid by the government due to its inability to take advantage of the land grant rate. In some of these six cases the destination cost as bid with the control clause was from ½ to 10½¢ lower than the destination cost figured by him from the nearest mill. He stated that the government would have saved amounts varying up to 46¢ if the commercial freight from a mill selected by him had been deducted before addition of the applicable land grant rate. He gave other examples where the destination cost bid was from 3¢ to 16¢ less than the commercial destination price and the bidder's net was increased from 2¢ to 46¢ above its net on commercial sales.[11]

Hayghe's formula was to take the bid commercial price, deduct the commercial freight from a bidder's mill, selected

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[9] (C) Tr. 21358-59.

[10] (C) Tr. 3749. For testimony of executives of various respondents as to how they computed prices where land grant rates are involved and how the government obtained the full benefit of such rates, to the same effect as Reiter's, see *supra*, pp. 792-816.

[11] (C) Tr. 1871-87, 2179-94.

by him because of its high commercial freight rate to the destination in question, and to the mill net so obtained add the applicable land grant rate. The difference between the destination cost so arrived at and the destination cost as bid represented the "saving". From the following tabulation it will be noted that the largest "savings" resulted at destinations in Florida where special prices to meet foreign competition were in effect.

Com. Ex.	Destination	Mill Selected	Cost to government under Hayghe's formula would have been
337 A-B	Red Bay, Ala.	Boyles, Ala.	5.7¢ less than bid destination cost.
338 A-B	Huntsville, Ala.	" "	1.8¢ " " " "
339 A-B	Gadsen, Ala.	" "	1.5¢ " " " "
339 A-B	" "	" "	2.5¢ more than bid destination cost.

Differences due to the fact that the land grant rates used by bidders were higher than those used by Hayghe.

Error was made by Hayghe in that he deducted a commercial freight rate from Boyles to Gadsen, Alabama, which would not be used to make the commercial price. If the correct commercial rate had been used the destination cost would have been 2.5¢ per barrel higher than that bid.[12]

Com. Ex.	Destination	Mill Selected	Cost to government under Hayghe's formula would have been
336 A-B	St. Petersburg, Fla.	Tampa, Fla.	1.6¢ more than bid destination cost
" "	" "	Boyles, Ala.	46.3¢ less than bid destination cost

The rates used by Hayghe do not include the 7% increase under Ex Parte which were in effect when bids were opened. The commercial price reflected $2.05 Tampa plus 47¢ freight, less a 20¢ reduction to

[12] Com. Ex. 339 B: Rates used by Hayghe, Com. Ex. 1110 A, pp. 3, 44; Alabama Rate Book.

meet foreign competition or $2.32.[13] This 20¢ reduction in the commercial price is reflected in the 46.3¢ saving as Lehigh's net at Boyles would have been 20¢ higher if the special price was not in effect. It is also reflected in the government's estimated cost of $343.20 or $2.60 per barrel. Award was made at $306.24 or $2.32 per barrel for shipment on commercial bill of lading.[14]

Com. Ex.	Destination	Mill Selected	Cost to government under Haygbe's formula would have been
334 A-B	Groveland, Fla.	Tampa, Fla.	0.5¢ more than bid destination cost
" "	"	"	Boyles, Ala. 40.8¢ less than bid destination cost

The bid commercial price of $2.52 reflected the port price base of $1.85 at Jacksonville, Fla., plus 67¢ freight. The use of this port price base is reflected in the mill nets at Tampa, Fla., and Boyles, Ala., and also in the government estimated cost of $780.00 or $2.60 per barrel award made at $756.00 or $2.52 per barrel on commercial bill of lading.[15]

Com. Ex.	Destination	Mill Selected	Cost to government under Haygbe's formula would have been
335 A-B	Brooksville, Fla.	Tampa, Fla.	7.6¢ more than bid destination cost
" "	"	Phoenixville, Alabama	31.3¢ less than bid destination cost

The commercial price of $2.46 reflects the port price base of $1.85 Jacksonville, Fla., plus 61¢ freight. The use of this port price base is reflected in the mill nets at Tampa, Fla., and Phoenixville, Ala., and also in the government estimated cost of $340.00. Awarded at $324.72 for shipment on commercial bill of lading.[16]

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[13] Resp. Ex. 1288: Lehigh's Memo 10/27/36 re St. Petersburg price, Com. Ex. 1962: List of price bases, Com. Ex. 1110 C, pp. 3, 100: Florida Rate Book.

[14] Com. Ex. 336 C-D: Tabulation of bids.

[15] Resp. Ex. 1288, Com. Ex. 1110 C, pp. 3, 50, Com. Ex. 334 B-C.

[16] Resp. Ex. 1288, Com. Ex. 1110 C, p. 20, Com. Ex. 336 C-D.

Harkness, of the Porcurement Division, testified that on sales to his office where the control clause was used the government obtained only about 50% of the full land grant benefit and gave as an illustration a destination cost bid with the use of the control clause which was 18¢ less than, the commercial destination price while there was a 37¢ difference between the land grant and commercial freight rate.[17]

The illustration used above was taken from an invitation for 132 barrels of cement for delivery to Inverness, Florida, opened on September 17, 1937. The prices bid were $2.44 for shipment on commercial bill of lading and $2.26 for shipment on government bill of lading. Harkness used the mill of National at Ragland, Ala. with the highest commercial rate of 95¢ per barrel, and a land grant rate of 57.65¢ per barrel, a difference of over 37¢ per barrel. Both the commercial price and the destination cost reflected the port price base of $1.85 Jacksonville, Fla. and the 18¢ difference between the commercial price and the destination cost as bid was the difference between the commercial and the land grant freight out of Jacksonville, Florida, to Inverness, Florida. Awarded to National for shipment on government bill of lading.[18]

W. Holmes, Legal Adviser, Procurement Division, War Department, testified that the office of the Quartermaster General had attempted to induce cement companies to bid without the control clause and had received no bids "on a firm price f.o.b. mill", although there was no difficulty in obtaining "a secret bid f.o.b. mill",[19] that it was not possible for the government to secure the full benefit of the land grant rates where they received destination costs bids

[17] (C) Tr. 4901-14.

[18] Resp. Ex. 1288: Lehigh's memo 10/27/36 re Jacksonville base, Com. Ex. 1110 C, p. 58, Com. Ex. 1058: National's bid and award.

[19] (C) Tr. 2339-40.

with the use of the control clause such as were received on the lettings for Fort Leavenworth and Fort Riley. He pointed out that while the destination cost figure was ½¢ lower than the destination price the difference between the applicable commercial and land grant rates was 8¢. He testified that he considered these lettings to be "typical cases".[20]

He was cross-examined by respondents' counsel concerning that statement and while maintaining that he had intended to refer to all the respondents in the case nevertheless he replied; time and again, "I do not know", "I cannot answer" or "I know nothing about the invitation" when asked whether specified invitations were issued by the War Department during the code period and whether numerous specified invitations issued by the Army since that time were not for bids f.o.b. destination and thus did not involve destination costs to the government with the use of the control clause. In the course of this cross-examination he stated "I know nothing about any Army Engineer purchases" and that his statement about "typical cases" was based on his knowledge of Quartermaster lettings. At the same time he testified that he did not know there were only four such lettings by the Quartermaster since the NRA code in Southern California. He said "I made a general statement but I didn't make a general statement with respect to particular invitations that were issued several years past". Although he claimed that his direct testimony was based on "having reviewed • • • other bids" he "could not say" whether he had examined specified invitations to which he was referred; nor could he say what types of prices those invitations called for.[21] He was asked whether his reference to "all" respondents in the case was intended to include various named respondents. After he replied in the affirmative Commis-

[20] (C) Tr. 2335-40.

[21] (C) Tr. 21005-24.

sion's counsel conceded that the named respondents "had nothing to do with land grant rates."[22] He "could not say", "did not know" and did not "recall" whether the two lettings concerning which he testified were typical of 20 named respondents.[23] He testified that he had prepared a memorandum in connection with his review of bids prior to taking the stand. When asked what had become of the memorandum he imagined "it had been destroyed". While testifying that he had examined all abstracts which in his opinion indicated "collusive" or "identical" bidding, he did not know the names of the companies whose records he had examined except on the Fort Leavenworth and Fort Riley lettings.[24]

Finally he testified that he had intended his "general observation" about "typical cases" to apply to all respondents even though they never could use a land grant rate and explained that in arriving at his general observation he had considered, among other things, the complaint issued by the Federal Trade Commission against the respondents herein.[25]

Further evidence relative to the connection between the control clause used by certain respondents and the benefits of land grant rates is digested in the following subdivision "8".

8. Comparison of Control Clause Used by Bidders With Government "Control Clause" and Relative Effect on Land Grant Benefits.

Attempts were made by government officials to induce the cement companies to bid without using a control clause.[1]

[22] Tr. 21039-40.

[23] Tr. 21047-51.

[24] Tr. 21061-64.

[25] Tr. 21066-71.

[1] Holmes, W., Legal Advisor, Proc. Division, War Dept. (C) Tr. 2339-40.

From 1935 to 1937, when the Comptroller General reversed himself and held the bidder's control clause was not objectionable, the Army Engineers disregarded the bidder's control clause and made awards on the basis of the destination price whenever there was no advantage in any other procedure.[2] Late in 1937 and early in 1938 various government purchasing agencies such as the Quartermaster's Corps, the Treasury Procurement Division and the Bureau of Reclamation took the position that the bidder's control clause was irregular for the purpose of securing f.o.b. mill prices.[3]

Feldman, Supervisor of Procurement Procedure, testified that a Quartermaster's Corps circular was sent out on April 29, 1937 to the effect that f.o.b. shipping point bids were desired and that bids with the bidder's control clause would be considered irregular. He said that the circular was rescinded recently in order to conduct business in orderly fashion and obtain cement and that this was the only means to obtain cement and to consider the lowest cost under bids as offered. He said further that a great many bids were disregarded which contained the bidder's control clause without regard to whether the price was lower than in the bid which was accepted.[4]

A provision had been inserted in the government invitations in varying forms, which government officials described in their testimony as a government control clause. This clause reserved the right to ship on a government bill of lading and to deduct the commercial freight from the des-

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[2] Rice, Attorney, U. S. War Dept. (C) Tr. 21354-56.
Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 180-84.

[3] Rice, *supra*, Tr. 1719-25.
Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 4862-64, 4885-95.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1232-36, 1261, 1279-80; and see Com. Ex. 366 E, par. 1.

[4] Com. Ex. 367; Tr. 2313-15, 21190-91, 21711-12, 21715-16, 21737-38.

tination price and add the land grant or special rate.[5] Specimens of the clause used by the Army Engineers, the Quartermaster's Corps and the Procurement Division are footnoted.[6]

Since the control clause in use by respondents allowed for reduction of the land grant, commercial or special rate, which ever was the lowest, the two clauses were in conflict

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[5] Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1232-36, 1261, 1279-80, 21653.
Rice, Attorney, U. S. War Dept. (C) Tr. 1719-25.

[6] "Bids are requested f.o.b. cars at the bidder's shipping point. Alternate bids may be submitted f.o.b. Newkirk, New Mexico, as provided in the bidding schedule. However, shipments will be made from bidder's shipping point to Newkirk on Government bills of lading and the official land grant freight rate or commercial rate, which ever is lower, at the time of opening bids will be deducted from the price bid in order to obtain the invoice price." (Com. Ex. 170 B, Par. XI,—from invitation of U. S. Engineers of August 5, 1936)

"* * * Firm prices f.o.b. bidder's shipping point and f.o.b. Government destination are desired. Bids which are qualified by requiring the Government to deduct or add freight charges for the purpose of computing the invoice price are not desired and will not be considered. * * *" (Com. Ex. 366 E, Par. 1—from invitation of Quartermaster's Corps of Sept. 13, 1937).

"In the event a bidder fails to quote a price f.o.b. shipping point * * * the Government reserves the right to determine the bidders price f.o.b. shipping point * * * by deducting from the bidder's price f.o.b. destination the * * * commercial freight * * * from shipping point * * * to destination and to make award at the * * * price f.o.b. shipping point * * * so determined. Shipments in such cases to be made on Government bills of lading. * * *" (Rice, Attorney, U. S. War Dept. (C) Tr. 1718-19 from U. S. Engineers invitation of May 22, 1937, Resp. Ex. 2285 H.)

"Bids purporting to name a guaranteed delivered cost to the Government at destination, with the provision that cost at mill may be determined by deducting from such delivered cost the lowest freight rate available to the Government * * * have been designated as irregular bids and will not be considered" (Com. Ex. 1054 D—from invitation of Procurement Division of Jan. 3, 1938).

and both could not be carried out at the same time.[7] And where the invitation contained the government clause and the bidder used his control clause the latter controlled.[8]

Fry, Purchasing Officer of the U. S. Department of the Interior, testified to two occasions, one in December 1934 and the other in October 1935, on which his department disregarded the bidder's control clause and deducted commercial freight from the destination cost figure to obtain an f.o.b. mill price. The successful bidders appealed and obtained settlements from the General Accounting Office of $384.75 and $2,362.56 respectively.[9] On the other hand a like claim was disallowed by the General Accounting Office in January 1935.[10] On one occasion, in October 1935, the Trade Practice Committee wrote to Penn-Dixie in connection with a complaint that it did not bid its filed price when Penn-Dixie had permitted the government to deduct the commercial freight rate from the delivered price and add the land grant rate on a bid to the Forest Service with the result that Penn-Dixie was the low bidder. None of the other bidders took exception to the clause and Penn-Dixie replied that it did not understand the problem and in the future would take exception to such action.[11]

Hayghe, of the Procurement Division, testified that he prepared the government control clause used by his office after conferences with Paulson, one of the trial counsel for the Federal Trade Commission who showed him "what some other division had done * * * and * * * (he) followed suit."[12] He said that these "conferences * * * were responsible entirely for the test case made * * * in Ala-

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[7] Rice, Attorney, U. S. War Dept. (C) Tr. 1719-25, 1788.

[8] Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 4894-95.

[9] (C) Tr. 140-48.

[10] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 150-54.

[11] Reiter, Chairman, Trade Practice Committee (C) Tr. 3478-80; Com. Exs. 277-2 Q, 2 C-2 E.

[12] (C) Tr. 4888, 4890-93.

bama.'' This clause was a new feature and prior to that time the invitations of the Procurement Division provided merely that unless the bidder complied with all the terms of the invitation his bid was a ''qualified'' one.[13]

Rice, Attorney, U. S. War Department, testified that the government control clause gives government the right to deduct commercial freight and take title at the mill while the bidder's control clause gives the government the right to deduct the lowest rate, which is generally a land grant rate, and take title at the mill. The witness stated that if the mills bid f.o.b. mill instead of delivered at government destination cost the government control clause would be unnecessary.[14]

He was cross-examined as to whether the government's control clause was not inequitable to manufacturers and testified that in the following hypothetical case under such clause the government would obtain the land grant benefit twice and the mill would lose an amount equal to the land grant rate:

	$2.00	— mill net necessary to pay manufacturers overhead.
	.25	— land grant rate.
	$2.25	— bidder's destination cost figure accepted on the basis of the government control clause.
Deduct	.50	— commercial freight.
	$1.75	— amount paid by government at the mill.
Add	.25	— land grant rate.
	$2.00	— laid down cost to government at destination (computed).[15]

On redirect examination the witness testified that in such a case the government was not taking the land grant rate

[13] Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 4885-95.

[14] (C) Tr. 1724-25, 1786-88.

[15] (C) Tr. 1731-33.

twice, but that it was "just the basis of making the award".[16] Yet, in response to a question by the Trial Examiner, he testified that if the final figure paid by the government was $2.25 (*i.e.*, the same as bidder's destination cost figure in the hypothetical case, which was 25¢ more than the total amount paid there by the government) "There isn't anyone who would lose there * * * we would only, in effect, be paying the land grant rate."[17] He testified also on re-direct examination that he had not observed any bids where the government received an allowance for freight twice and that the only possible way for the government to derive the full land grant rate benefit was in terms of what it paid to the railroad and that no payment to a manufacturer was in fact, obtaining the benefit of the land grant rate.[18] Yet in response to another hypothetical case posted by Commission's counsel where the destination cost figure was $2.25 (consisting of 25¢ land grant rate and a $2.00 mill price) he stated that if a commercial freight of $2.00 was deducted there would be nothing left for the mill and Commission's counsel conceded that the benefit to the government in excess of the land grant rate would be almost infinite.[19]

Finally Rice conceded on recross-examination that in cases involving land grant rates and deduction of the commercial rate under the government's clause the cement company would have to know something about freight rates in order to determine whether it could compete. He conceded further that a cement company could not compete at a distant destination unless its bid price included a sufficient amount for absorbing the freight, otherwise high freight rates would entirely consume the cost per barrel.[20]

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[16] (C) Tr. 1795.

[17] (C) Tr. 1800-01.

[18] (C) Tr. 1792-94.

[19] (C) Tr. 1796-97.

[20] (C) Tr. 1807-09.

9. Government Equalization Clause

With respect to equalization generally government officials testified that any bidder should have an opportunity to equalize all differentials including freight rates,[1] and that in bidding where land grant rates are involved, a mill price should be bid with an offer to equalize certain competition.[2]

For some years prior to 1938 government purchasing agencies, by the terms of their invitations, permitted bidders to equalize land grant freight rates. For example an invitation by the War Department on its standard form, dated April 18, 1935 contains the following clause:

> "* * * No consideration will be given to offers to equalize transfer charges and/or transportation, other than rail transportation charges." (Resp. Ex. 1082-C)

An example of how land grant rates have been equalized is set forth in the footnote.[3]

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[1] Haygbe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 2452-53.

[2] Rice, Attorney, U. S. War Dept. (C) Tr. 1827.

[3] EXAMPLE OF EQUALIZATION OF LAND GRANT RATES

"You will note that our bid was $.415419 per sack, f.o.b. our mill at Phoenixville, Alabama. This figure was arrived at in the following manner:

$.4375	per sack	—Lone Star's base at Boyles, Alabama.
.115775	" "	—Land Grant rate Boyles to Hickman, Kentucky.
.553275	" "	—Cost to Government on Lone Star.
.137856	" "	—Land Grant rate Phoenixville to Hickman, Kentucky.
$.415419	" "	—Figure we must quote to meet the competition of Lone Star."

(Resp. Ex. 855 A-B: Interoffice letter of Alpha, dated June 21, 1929, describing computation of its bid on letting by Reclamation Bureau opened on June 3, 1929 (Com. Ex. 771).)

Coogan, Vice President of Alpha, testified that an equalization clause permitting the bidder to specify a maximum amount which it would allow to equalize either (1) the maximum land grant deduction available from the shipping point of any bidder, or (2) the lowest available land grant rate, or (3) the lowest net rate whether land grant or otherwise, was first set forth in an invitation issued by the Department of Agriculture in December, 1938.[4] Bowen, Vice President of Lehigh, testified that he had first seen the clause in an invitation issued by the Quartermaster General.[5] The portion of the clause whereby the bidder made an allowance to equalize the maximum land grant deduction was as follows:

> "TYPE 1. We will make an additional allowance to equalize the maximum *land grant deduction from the corresponding commercial freight rate* which is available to the Government and applicable from the shipping point of any bidder offering a shipping point price on corresponding items of this proposal. Provided, however, that this additional allowance shall not exceed the amount shown below." (Resp. Ex. 801-E)
>
> LAND GRANT DEDUCTIONS

In substance the above equalization clause called for a destination price bid from which, in order to arrive at an f.o.b. mill price, there was deducted commercial freight plus the greatest difference in land grant rates from the mill of any bidder to the destination.[6] Each bidder was given an opportunity to equalize the land grant freight rate to the extent of the difference between the rate applicable from his mill and the rates applicable from mills of all other bidders.[7]

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[4] Tr. 23042-43, 24202-23.

[5] Tr. 27087-90, 27164-67.

[6] Coogan, Vice President, Alpha (R) Tr. 24406-09.

[7] Bowen, Vice President, Lehigh (R) Tr. 27087, 27090, 27164-67.

Executives of Alpha, Lehigh and Lone Star testified that they had used this equalization clause.[8] Alpha used it on most of its government bids after December, 1938 whether or not it was contained in the invitation to bid.[9] Lehigh has used the clause on bids to the War Department and the Department of Agriculture and whenever it was contained in the invitation, and on a few occasions when it was not.[10] There were only a few instances where Lehigh got any business through use of this clause and some of its bids were rejected although they resulted in a lower destination cost than on the bid which was accepted.[11] Alpha used the clause because the government favored it and wanted to bid in an acceptable manner.[12] Lone Star offered proof to the same effect and that such use was not a matter of policy but depended on whether its competitive position would be improved.[13] Coogan of Alpha believed that competitors used the clause recently but said he had no direct knowledge.[14] On one bid it was used by three out of over a dozen bidders.[15] W. R. Blair of Southwestern (El Paso) testified that he had used such a clause once or twice but discontinued it because a government agency advised that it would penalize his company below a certain figure.[16]

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[8] Coogan, Vice President, Alpha (R) Tr. 23042-43, 24411-12. Bowen, Vice President, Lehigh (R) Tr. 27087-90, 27164-67. Koch, Vice President, Lone Star (R) Tr. 32715-22.

[9] Coogan, *supra*, Tr. 23042-43, 24411-12.

[10] Bowen, *supra*, Tr. 27076-82, 27087-90, 27164-67.

[11] Bowen, *supra*, Tr. 27076-82.

[12] Coogan, *supra*, Tr. 24230-33.

[13] Koch, *supra*, Tr. 32735-37.

[14] (R) Tr. 24230-33.

[15] Coogan, *supra*, Tr. 24406-12.

[16] (R) Tr. 39013-14.

The effect of this clause is to give the government the benefit of both the bidder's own land grant rate and also the lowest land grant rate of any competitor.[17] Destination costs may differ under the clause depending entirely upon the prices quoted in the first instance. If each bidder started with the same price at the destination then the effect of equalization would be to make the cost of each bidder the same.[18] Thus Bowen testified:

> "* * *He agrees to adjust his f.o.b. mill price by the amount of the advantage which any other bidder may have over him with respect to commercial or land-grant rates. * * * The adjustment is entirely one of freight and has no relation to price." (Tr. 27089)

It results in varying f.o.b. mill prices and enables the bidder to meet competition at the destination which it could not do by bidding a fixed and inflexible mill price.[19]

Bowen testified that the clause does not have the effect of an agreement to make delivered prices equally low but that it only equalizes freight rates.[20] Similarly, Coogan testified that the clause did not make his company's delivered cost the same as that of its lowest competitor although it could occur depending entirely on the figure the bidder started with.[21]

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[17] Coogan, Vice President, Alpha (R) Tr. 24406-09.
Bowen, Vice President, Lehigh (R) Tr. 27087, 27090, 27164-67.

[18] Id., Bowen.

[19] Coogan, *supra*, Tr. 24230-33.

[20] (R) Tr. 27087, 27090, 27164-67.

[21] (R) Tr. 24406-12.

E. Sealed Bids to U. S. Government: 1925-1938

1. Summary (Invitations in Evidence Chart)

Introduction

In evidence are invitations and tabulations of lettings by some dozen purchasing agencies of the United States Government for dams and other uses, together with abstracts of bids in response thereto. These invitations are for a total of 25,010,519 barrels. As shown on Chart IV-C on page 874, the invitations are for six general types of prices namely:

1. f.o.b. mill (8,861,318 barrels);
2. f.o.b. destination (8,580,038 barrels);
3. f.o.b. mill or f.o.b. destination (6,279,590 barrels);
4. f.o.b. mill and f.o.b. destination (550,373 barrels);
5. f.o.b. mill and/or f.o.b. destination (374,000 barrels); and
6. f.o.b. destination with stated amount to be deducted for f.o.b. mill (365,200 barrels).

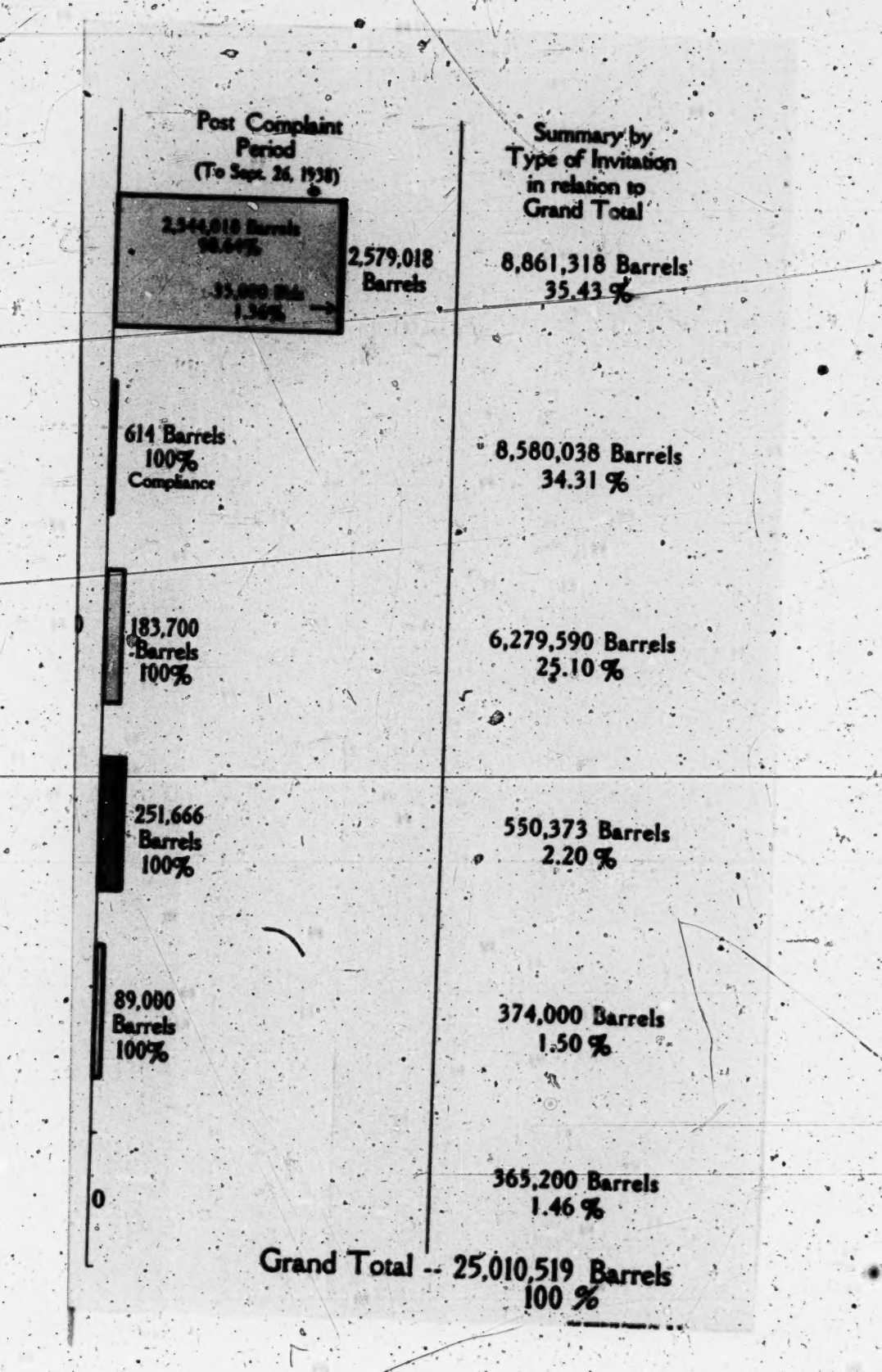
The agencies which issued the invitations, with the quantities invited by each, were:

Engineers (War Dept.)	7,181,490	barrels
Bureau of Reclamation (Dept. of Interior)	7,514,000	"
T.V.A.	7,300,000	"
Procurement Div. (Treasury Dept.)	2,582,676	"
Navy Dept.	311,450	"
Six Miscellaneous Departments .	120,403	"

SHOWING TYPES OF INVITATIONS AND COMPLIANCE-DISPUTED COMPLIANCE AND NON-COMPLIANCE BY BIDDERS

LEGEND → Compliance | Disputed Compliance | Non-Compliance

Type of Invitation	Pre-NRA Code Period (From April 10, 1925)	NRA Code Period	Post NRA Code Period
F.O.B. Mill	100% — 1,792,500 Barrels	1,855,000 Barrels 36.00% — 3,265,800 Barrels	1,224,000 Barrels
F.O.B. Destination	185,820 Barrels 100%	100% — 8,240,550 Barrels	153,054 Barrels 100%
F.O.B. Mill or F.O.B. Destination (Bidder's Option)	265,700 Barrels 100%	964,000 Barrels	4,820,190 Barrels 99.05% — 46,000 Bbls. .95% — 4,866,190 Barrels
F.O.B. Mill and F.O.B. Destination	5,800 Bbls 64.80% Comp. — 3,150 Bbls 35.20% Non-Comp. — 8,950 Barrels	2,600 Barrels 100% Disputed Compliance	1,200 Bbls - .42% Compliance; 35,957 Bbls - 12.52% Disp. Comp.; 250,000 Bbls - 87.06% Non-Comp. — 287,157 Barrels
F.O.B. Mill and/or F.O.B. Destination (Bidder's Option)	0	26,000 Barrels 100% Disputed Compliance	259,000 Barrels 100%
F.O.B. Destination (Stating amount to be deducted for F.O.B. Mill Price)	365,200 Barrels 100%	0	0


Post Complaint Period
(To Sept. 26, 1938)
2,544,018 Barrels
98.64%
35,000 Bbls
1.36%
2,579,018 Barrels
614 Barrels
100%
Compliance
183,700 Barrels
100%
251,666 Barrels
100%
89,000 Barrels
100%
0
Summary by Type of Invitation in relation to Grand Total
8,861,318 Barrels
35.43 %
8,580,038 Barrels
34.31 %
6,279,590 Barrels
25.10 %
550,373 Barrels
2.20 %
374,000 Barrels
1.50 %
365,200 Barrels
1.46 %
Grand Total -- 25,010,519 Barrels
100 %

Roughly half of the volume covered was invited during the NRA Code period. The number of barrels under the invitations in different periods is as follows:

1. Pre-NRA Code: April 1925 to Dec. 7, 1933	2,618,170
2. NRA Code: Dec. 7, 1933 to May 27, 1935	12,498,950
3. Post NRA Code: May 27, 1935 to July 2, 1937	6,789,401
4. Post complaint: July 2, 1937 to September 26, 1938	3,103,998
Total	25,010,519

The supporting exhibits from which Chart IV-C and the above tabulations were made together with explanatory notes thereon are set forth under subheadings 5 b-d, *infra*, p. 932 *et seq.* The Chart is limited to invitations and bids in evidence. It covers bids by non-respondents as well as by respondents, the great majority being by respondents.

2. Price Identity

The Commission's Findings with respect to the general identity of cement prices and the non-exchange of basing point prices have been set forth above in the digest of the evidence relative to Sealed Bids to States (Part IV A, *supra*, p. 701) and relative to Cement Pricing—Commercial (Part II, *supra*, pp. 203-335). As stated there respondents accept the Finding as to identity and there is no issue concerning the fact that prices are substantially identical at any given time and place. Accordingly, the extent of such identity on bids to the federal government as shown in the record will not be detailed. The evidence digested below relates to the extension to sealed bids to the federal government of the influences that bring about identity in commercial prices. (See Part II C, *supra*, p. 203 *et seq.*, as to identity of commercial prices.)

a. Sales at Regular Commercial Prices

Identity of sealed bids occurs because the bids are generally made at commercial delivered prices.[1] When submitting sealed bids to the United States, cement manufacturers generally use the same methods and prices as in commercial pricing. This appears from their responses to the questionnaire issued by the Federal Trade Commission in May, 1931, which requested explanation of methods used in determining delivered prices when submitting sealed bids. Typical responses show that such prices, like commercial prices, were computed from base prices plus freight, that the manufacturers kept themselves informed as to the lowest current destination prices of competitors and sought to meet that competition where it resulted in attractive business.[2]

Detailed evidence as to the ways in which different respondents determine their commercial prices is digested in Part II—Cement Pricing—Commercial, pages 335-615, especially pages 409-471.

Executives of 27 respondents testified that when they filed sealed bids with the federal government they used their regular commercial prices at the destinations for which the bids were requested. This testimony consisted

[1] McGovern, Sales Manager, Hermitage (R) Tr. 36336-37.

[2] Com. Ex. 3152 C (Alpha).
Com. Ex. 3114 D (Edison).
Com. Ex. 3146 C (Keystone).
Com. Ex. 3126 E (Lawrence).
Com. Ex. 3143 I (Lehigh).
Com. Ex. 3117 D (Missouri).
Com. Ex. 3127 D (Nazareth).
Com. Ex. 3135 D-E (Penn-Dixie).
Com. Ex. 3133 G (Pittsburgh).
Com. Ex. 2829 B (Wolverine).

both of general statements of company policy and also of explanations of prices bid on specified lettings.[3]

The evidence with respect to sales involving land grant and special freight rates shows that, as a rule, such sales are the only exception to the general practice of quoting commercial prices to the government. (Part IV C, *supra*, p. 793; and see p. 813, subd. (a).)

The government, in purchasing at regular commercial prices, is treated in a separate class with dealers, state

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[3] Alpha: Coogan, Vice President (R) Tr. 24238, 24034-35, 24078-84, 24092-93, 24099, 24103-05, 24114-40, 24051-55;
Fellows, Sales Manager, Alpha (R) Tr. 25731-32;
Postelle, Sales Manager, Alpha (R) Tr. 25202-03, 25235-36.
Aetna: Calvin, President, Tr. 30096-99.
Bessemer: Warren, Vice President (R) Tr. 32322.
Dewey: Moore, Vice President (R) Tr. 47325-27.
Edison: Sweeney, Vice President (R) Tr. 35799.
Federal: Bates, Sales Manager (R) Tr. 30596.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29409-11, 29517.
Hermitage: McGovern, Sales Manager (R) Tr. 36326-29.
Keystone: Scott, President (R) Tr. 27560.
Kosmos: Horner, President (R) Tr. 36814-15.
Lawrence: Ackerman, Vice President (R) Tr. 31195.
Lehigh: Bowen, Vice President (R) Tr. 27083-84, 27231.
Lone Star: Koch, Vice President (R) Tr. 32773-74.
Medusa: Dawson, Vice President (R) Tr. 40059-60.
National: Dannelly, Vice President (R) Tr. 39667.
Nazareth: Robeson, Vice President (R) Tr. 28043-45.
Nebraska: Hoenig, Sales Manager (R) Tr. 42052.
North American: Harte, Vice President (C) Tr. 8059-60.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38148, 38303-04.
Petoskey: Lucas, Vice President (R) Tr. 38750.
Pittsburg: Letzkus, Sales Manager (R) Tr. 37702.
Southern States: Elcock, Vice President (R) Tr. 37661.
Southwestern: Watren, G. E., Vice President (R) Tr. 29022-27, 29031-32;
Blair, Sales Manager (El Paso) (R) Tr. 39368.
Superior: Davis, President (R) Tr. 29596-97.
West Penn: McKee, Vice President (R) Tr. 27866-67, 27747-48.
Whitehall: Elliott, Vice President (R) Tr. 28601-03.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35913.

purchasing offices and railroads. It obtains the same discount as dealers and thus buys for less than the ordinary ultimate consumer.[4]

Admiral Peoples, U. S. Director of Procurement, testified that in his 30 years' experience in the government he had never paid a penny more for cement than the prevailing market price.[5]

Rice, Attorney, U. S. War Department, testified that he could not remember any instance where the government paid more than the prevailing commercial price and referred to an instance where 9 out of 11 bidders on a particular project quoted prices which were below the cost estimate prepared by the government prior to the receipt of bids.[6]

There is considerable testimony of respondents' executives explaining their reasons for not preferring the government over other purchasers, such as that regular customers would react unfavorably and seek similar consideration, and that sales to the government are minor and irregular, involving more difficulties of service, specifications, "red tape" and equal or greater sales expense.[7] An executive of one respondent testified that it would be unfair to give quantity discounts and another eliminated

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[4] Calvin, President, Aetna (R) Tr. 30098-99.
Bowen, Vice President, Lehigh (R) Tr. 27231.
Robeson, Vice President, Nazareth (R) Tr. 28043-45.

[5] (C) Tr. 10366.

[6] (C) Tr. 1736-38.

[7] Blair, W. R., Sales Manager (El Paso) Southwestern (R) Tr. 39006-09.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38148-49.
Coogan, Vice President, Alpha (R) Tr. 24985.
Davis, President, Superior (R) Tr. 29596-97.
Dawson, Vice President, Medusa (R) Tr. 40059-60.
Elliott, Vice President, Whitehall (R) Tr. 28608-16.
Horner, President, Kosmos (R) Tr. 36814-15; (Offer of Proof) Tr. 36929-30.

such discounts because it wanted to sell all customers in the same market at the same price.[8] Hartley, Sales Manager of the non-respondent South Dakota State plant, does not give special prices to either the federal government or to large contractors.[9]

The relatively minor fraction of government purchases as compared with purchases by dealers is shown on Chart I-C (Part I, *supra*, p. 37) and further evidence is digested there showing the reasons why cement producers have found sales to the government to be less desirable than their regular dealer business (Part I, *supra*, pp. 40-41). Similar evidence is found in the reasons why various respondents did not sell to the government below their filed prices during the Code period as permitted by Executive Order 6767 (Part III, *supra*, p. 669 *et seq.*).

The evidence shows that on some invitations in the record the government obtained prices lower than commercial prices. These include the following:

T.V.A., Coal Creek, Tenn., March 1934 (13¢ lower).[10]
T.V.A., October 1934, (Average 40¢ lower*).[11-12]
Tygart River Dam (20¢ lower on first bid, 34¢ lower on last bid).[13]

Letzkus, Sales Manager, Pittsburgh (R) Tr. 37702, 37917.
Lucas, Vice President, Petoskey (R) Tr. 38750.
McKee, Vice President, West Penn (R) Tr. 27744.
Robeson, Vice President, Nazareth (R) Tr. 28054-56.
Warren, F. B., Vice President, Bessemer (R) Tr. 32319-21.
Warren, G. E., Vice President, Southwestern (R) Tr. 28956.

[8] McKee, *supra*, Tr. 27743-44.
Scott, H. M., President, Keystone (R) Tr. 27560-61.

[9] (R) Tr. 41545-46.

[10] Lewis, Manager, Volunteer (R) Tr. 31454; Com. Exs. 397, 1110-2 A.

* Computed.

[11] Com. Exs. 401, 2366.

[12] The evidence concerning the TVA lettings is set forth in detail under Part IV F, *infra*, pp. 991-95.

[13] Coogan, Vice President, Alpha (R) Tr. 24388-89, 24447-48, 24714; Com. Ex. 178 C, Item M.

Fort Peck Dam Projects (33¢ lower and 60¢ lower).[14]
Muskingum Dam.[15]
Newkirk, New Mexico.[16]
Conchas Dam.[17]
Greenville, Mississippi.[18]
Ohio River Locks and Dam.[19]

Other references to lower prices over a period from the reclamation work in the early days down to the Procurement Division purchases in 1937 and 1938 are found in the testimony of several executives.[20] Neylan, Assistant General Sales Manager of Lone Star, said that there was much of this in the industry in 1931 and 1932 and that it is going on all the time.[21] Moore, Vice President of Dewey, testified that on several occasions the government had been able to induce considerably lower prices by rejecting and reinviting bids.[22]

Government purchasing officers feel they are entitled to special price consideration. Ashley, Chief of the Division of Purchases in the Department of Agriculture, said that the government expects better prices as a large and continuous buyer and that it gets better bargains in other

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[14] Crapo, Vice President, Huron (R) Tr. 11092-96; Com. Exs. 329 C, 1952, 2366 B, 164 I, 874 L-N.

[15] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37914, 37995-96.

[16] Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 39367-68.

[17] Id., Tr. 39094-101, 39371-72.

[18] Brooke, Vice President, Monarch (R) Tr. 42358-61.

[19] Colburn, Vice President, Marquette (R) Tr. 39946-50.

[20] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38308.
Coogan, Vice President, Alpha (R) Tr. 24714, 24985.
Elcock, Vice President, Southern States (R) Tr. 37510-11.
Koch, Vice President, Lone Star (R) Tr. 33224-25, 32282-83.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37915.
Rooney, Vice President, Huron (R) Tr. 33696-98.

[21] (C) Tr. 6183-84.

[22] (R) Tr. 47325-27.

fields than commercial customers.[23] Admiral Peoples, U. S. Director of Procurement, was asked if he believed that the government, because of its bigness, should be allowed special consideration and replied that in his experience the big buyer always gets better prices for larger quantities because of greater purchasing power.[24]

b. Objective of Meeting Prices at Destination

The chief aim of the different respondents in the various methods which they used for quoting prices to the government was to meet the lowest price of any competitor effective at the destination because that is the point of use and because the government awards contracts on the basis of the cost at the destination. Time and again executives of different companies so testified both in relation to their pricing methods, as such, and in relation to their bids on particular lettings in the record. This was their guiding purpose irrespective of whether land grant rates were involved and whether they were bidding destination prices, f.o.b. mill prices, destination costs figured with the use of the control clause, or otherwise.[1]

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[23] (C) Tr. 5447-49.

[24] (C) Tr. 10323-26.

[1] Alexander, President, Missouri (R) Tr. 37128.
Bowen, Vice President, Lehigh (R) Tr. 27071-73, 27099-106.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38441-44, 38501-03.
Brooke, Vice President, Monarch (R) Tr. 42410.
Dannelly, Vice President, National (R) Tr. 39652-54.
Elliott, Vice President, Whitehall (R) Tr. 28606-08, 28675-77.
Fellows, Sales Manager, Alpha (R) Tr. 25731-32, 25740-49, 25769, 25805-06, 25914-16.
Hoenig, Sales Manager, Nebraska (R) Tr. 42168-70.
Koch, Vice President, Lone Star (R) Tr. 32671, 32729, 33232-34.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37914-15.
McGovern, Sales Manager, Hermitage (R) Tr. 36319-24, 36329-30, 36353, 36359, 36316.

[Continued on page 882]

Evidence showing that awards are made by the government on the basis of the lowest laid-down cost at destination is digested below (*infra*, p. 918).

c. Meeting Prices Filed Under NRA Code

The evidence digested in Part III E (*supra*, p. 671 *et seq.*) shows that under the open price filing provisions of the Code identical prices were inevitable.

Executives of many respondents testified that on government lettings during the Code period they met the prices filed by competitors with the Code Authority. This included bids on particular invitations which are in evidence and, to some extent, prices filed with the Trade Practice Committee in the period immediately after the *Schechter* decision.[1]

The following is a list of Exhibits in evidence consisting of notices of price filings applicable to particular gov-

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[Continued from page 881]

Moore, R. W., Vice President, Dewey (R) Tr. 46980-90, 47396, 47400-11, 47420-21.
Neylan, Ass't General Sales Manager, Lone Star (C) Tr. 6181-84, 6679.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39859.
Robeson, Vice President, Nazareth (R) Tr. 28176-77.
Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47599-604.
Sutherland, Ass't to Vice President, Universal Atlas (R) Tr. 35541, 35550-55, 35568-69.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46535-36.

[1] Bates, J. E., Sales Manager, Federal (R) Tr. 30626.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38315, 38442.
Colburn, Vice President, Marquette (R) Tr. 39042-45, 39947-49, 39979-80.
Coogan, Vice President, Alpha (R) Tr. 24050, 24131.
Brooke, Vice President, Monarch (R) Tr. 42421-22.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37702, 37911-12, 37917.
Horner, [illegible]esident, Kosmos (R) Tr. 36815.
Warren, G. E., Vice President, Southwestern (R) Tr. 28970-71.
Lucas, Vice President, Petoskey (R) Tr. 38750.

ernment lettings which were disseminated by the Code Authority and the Trade Practice Committee amongst the interested bidders, together with the abstracts of bids on said lettings. These show that the various respondents who bid upon the lettings quoted the filed price of which they had been advised by the Code Authority or the Trade Practice Committee.

Notices	Pertaining to bids on Com. Ex. Nos.
Com. Ex. 399 A-B	397
Resp. Ex. 1317	792 A
Com. Ex. 164 D	165
Com. Ex. 164, J, N, O	166
Com. Ex. 191 A-B	192, 794
Resp. Ex. 2994	193
Com. Ex. 925, 6 A-6 D	401
Resp. Exs. 811, 815, 1718	178
Resp. Ex. 2992, Com. Ex. 820-1 H	171
Resp. Ex. 1080 A-B	795
Com. Ex. 308 B-F	1099 R

d. Continuous Presence of Some Non-Identity of Prices

Both government officials and executives of respondents testified that there has always been some degree of non-identity of prices on sealed bids. Taylor, of the Reclamation Bureau, said he had received some non-identical bids before, during and after the NRA Code.[1] He testified that on the Marshall Ford Dam letting of June 21, 1937, four f.o.b. destination bids were received all in different amounts as follows:

Republic P. C. Co.*	$2.06	for 60,000	barrels
Trinity P. C. Co.*	2.09	" 200,000	"
Universal Atlas	2.13	" 50,000	"
Lone Star	2.25	" 50,000	"[2]

* (non-respondent)

[1] (C) Tr. 1244-45.

[2] (C) Tr. 313-16.

Rice, of the War Department, said that at times he had received lower delivered costs bids from one bidder than another.[3] He testified that some companies made non-identical bids on the lettings for Fort Peck of June 10, 1936, Tucumcari, New Mexico of September 4, 1936 and Greenville, Mississippi of September 9, 1935, although most of the bids were the same.[4] Other government officials who testified as to the receipt of non-identical bids, including instances where there were variations in discounts and other incidents of price, were Ashley of the Department of Agriculture,[5] Hayghe, Chief of Traffic in the Procurement Division,[6] White, Examiner in the Federal Trade Commission,[7] Custer of the Navy Department,[8] and Rothbard of the U. S. Bureau of Reclamation.[9]

McGovern, Sales Manager of Hermitage, testified that since the NRA Code sealed bids frequently have been different.[10] The only identical bids made by Marquette were five during the Code period.[11] Several other executives testified that there was generally some degree of non-identity or specified particular lettings on which such bids were

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[3] (C) Tr. 1825.

[4] (C) Tr. 1529-32, 1533-38, 1540-43.

[5] (C) Tr. 5406-09.

[6] (C) Tr. 2447-48.

[7] (C) Tr. 16465-66, 16473-77.

[8] (C) Tr. 21307-09.

[9] (C) Tr. 1162-63.

[10] (R) Tr. 36320-24.

[11] Colburn, Vice President, Marquette (R) Tr. 39042-46.
Com. Exs. 165-66, 171, 193.
Resp. Exs. 2992-95.

made.[12] One executive testified that his company bid too high on a particular letting either because of an error in calculation or because it did not have accurate information on the last quoted prices.[13] Another testified that different prices were bid but not openly.[14]

e. Opinions Expressed by Government Officials Concerning Price Identity

The opinions of the government officials who testified on behalf of the Commission were substantially to the effect that the degree of identity of prices for cement at a given time and place indicated lack of competition. The views and conclusions which these witnesses were permitted to state are summarized below:

Harman, Georgia State Procurement Officer, found a great deal of identity at times in bids on other commodities but felt that cement prices had more noticeable identity excepting by comparison with steel.[1]

Ashley, Chief of Purchases in the Department of Agriculture, said that cement bids were identical in the great majority of cases. He thought there was something "strange" in this because he found that the bulk of bids for other commodities showed widely different prices at a given time. He said he would not pay more for one brand

[12] Neylan, Ass't General Sales Manager, Lone Star (C) Tr. 6184.
Roberts, Traffic Manager, Volunteer (R) Tr. 31968-69.
Hogan, President, Lone Star (R) Tr. 34690.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37992-93.
Bowen, Vice President Lehigh (R) Tr. 27044-45.
Robeson, Vice President, Nazareth (R) Tr. 28175-76.
McGovern, Sales Manager, Hermitage (R) Tr. 36353.
Elliott, Vice President, Whitehall (R) Tr. 28655.
Parsons, Sales Manager, Volunteer (C) Tr. 5167-68.

[13] McKee, Vice President, West Penn (R) Tr. 27868, Soil Conservation Service letting of July 21, 1936.

[14] McGovern, *supra*, Tr. 36359-60.

[1] (C) Tr. 4805-06.

of cement than another, but expects one manufacturer to give a lower price than another.[2]

Custer, of the Navy Bureau of Supplies and Accounts, testified that during the NRA Code period he received identical bids on a great many commodities in addition to cement and that he was still receiving them on some materials on June 30, 1937. Before the Code he found such bids to be exceptional and occurring only on a few items like cement and certain classes of steel.[3] It was his experience that bids on cement were generally identical in terms of delivered costs, including prices inserted in the spaces provided in invitations for f.o.b. mill bids, and that the cost would be the same on government destination cost bids as on destination prices.[4] He said his department was able to buy other items without the same degree of identical bidding, such as hardware, lumber, machinery, textiles and coal, all of which he said are bought on specifications which fix quality standards.[5]

Feldman, Supervisor of Procurement Procedure, Quartermaster's Corps, War Department, testified that he had difficulty in securing competitive bids and that he had been unable to obtain competition because bids were identical.[6]

Rothbard, Attorney, U. S. Bureau of Reclamation, testified that on a rough guess 50% of the bids on cement received by his office were non-competitive and that such bids were less competitive than on other commodities.[7] By "competitive" he meant non-identical in prices or terms of sale.[8] He said that his experience was limited to bids

[2] (C) Tr. 5384, 5469-72.
[3] (C) Tr. 2572-73.
[4] (C) Tr. 2540-41.
[5] (C) Tr. 2551-55.
[6] (C) Tr. 2292, 2313-14.
[7] (C) Tr. 1120-22.
[8] (C) Tr. 1155.

of over $10,000, that he did not intend to imply that any specific company refused to bid in the manner requested and that he was just talking in general terms.[9]

Admiral Peoples, Director of Procurement, said that there were a great many identical bids in standard commodities other than cement such as microscopes, steel piping and paper cups.[10] He believes identical bids are noncompetitive.[11] He estimated that in the last six months approximately 95% of the cement bought by his office was at identical prices at given destinations. He was of the opinion that such identity made the statutory provision (R. S. §3709) for awards to the lowest responsible bidder of no value, and that it indicated an agreement to maintain a certain price.[13] He said that it was his experience that one seller will meet the price of his competitor once and then go below it and that the second seller will then go lower. When asked if there is some bottom point, he said that ordinary market conditions would take care of that.[14]

3. Denials of Agreement and Independent Action on Sealed Bids

The Commission's Finding that there has been "no systematic exchange" of prices has been set forth above with the evidence relative to Sealed Bids to States (Part IV A, *supra*, pp. 704-05).

The evidence digested here shows that respondents' executives denied that they had any agreement, understanding or communication with competitors with re-

[9] (C) Tr. 21681-88.

[10] (C) Tr. 10324.

[11] (C) Tr. 10316-17.

[12] (C) Tr. 10343.

[13] (C) Tr. 10222-23, 10229-31, 10507.

[14] (C) Tr. 10323-24.

spect to the prices which they quoted on sealed bids to the government or the methods which the different respondents employed in arriving at those prices. These denials covered specific bids on invitations which are in evidence and sealed bids generally and were phrased in positive language. Coupled with the denials were explanations supported by office records and other documentary evidence showing the actual computations and procedures followed by particular respondents in computing prices on such bids. Inasmuch as invitations and abstracts of bids on well over 100 lettings of the federal government in the 13 year period from 1925 to 1938 were introduced in evidence executives of each respondent bidder did not have an opportunity to testify or introduce other evidence in denial of agreement on each letting and in explanation of their computations thereon. The Trial Examiner curtailed such proof as cumulative. No executive who was examined on the subject failed to deny agreement on prices or methods of bidding.

Illustrative of the denials of agreement concerning sealed bids generally are the following:[1]

AETNA:

> The price which it quotes to the United States is not "the result of any agreement between Aetna and competing cement manufacturers."[2]

ALPHA:

> It did not have "any contact with any • • • competitors at all in any way which influenced the price that • • • (it) bid," neither "asking them what they were going to bid" nor "picking up the prices and the determining of prices from them."[3] In no instance was there "any case in which any • • • competitors were advised what the Alpha Company in-

[1] NOTE: These quotations include excerpts from questions asked of the witnesses where their answers were flat denials.

[2] Calvin, President (R) Tr. 30096.

[3] Fellows, Sales Manager (R) Tr. 25780.

tended doing, or was going to do or anything about it before the bids were opened," and "they have never advised us."[4]

DEWEY:

It has never "had any agreement or understanding to quote prices to the Federal Government in accordance with any particular pricing method," nor has it "ever, at any time, agreed with any competitor * * * to quote the same price as that competitor for cement at any place, or to submit the same bid on any public contract."[5]

EDISON:

None of the bids which it has submitted has been "the result of any understanding or arrangement with any competitive company."[6]

HERMITAGE:

It has no "understanding or agreement * * * to employ or use any particular method of quoting prices" or "to quote prices identical with the prices of * * * (its) competitors." In quoting its regular commercial price when destination prices have been called for, it does not do so "as the result of any understanding or agreement with any Respondent Companies."[7]

LONE STAR:

It never had "any discussions with * * * (its) competitors with respect to the manner in which * * * (it) bid on Government business" and never "had any understanding or agreement with regard to the way * * * it bid." None of the different methods which it has followed in bidding to Federal Departments has been "the result of any understanding or agreement * * * between the Lone Star Company and its competitors," nor has its "company policy with respect to the manner in which * * * (it) bid on any

[4] Postelle, Sales Manager (R) Tr. 25045-49.

[5] Moore, Vice President (R) Tr. 46988.

[6] Sweeney, Vice President (R) Tr. 35799-80.

[7] McGovern, Sales Manager (R) Tr. 36334-35, 36329.

of the Government lettings been determined in any way by The Cement Institute.'"[8]

MISSOURI:

It has never "discussed, or had any agreement, with any of * * * (its) competitors with reference to bidding * * * at the request of the United States Government."[9]

SOUTHWESTERN:

Its bids on large Government orders have not been "discussed at any meetings with competitors or any district meetings of The Cement Institute" and it had no "agreement * * * whatever" "with any of * * * (its) competitors with reference to bids on any quantity to State or Federal Government bodies."[10]

UNIVERSAL ATLAS:

Stone, Vice President, called as a witness by the Commission, denied that there were "any meetings for the purpose of fixing prices on identical bids"[11] and explained how prices on identical bids were arrived at by his Company, as follows:

"A. We have quoted the prices that we ourselves have set up within territories near our plants, but as we would go beyond the confines of those territories as limited by freight rates, we have encountered lower prices quoted by our competitors. That is in our day-to-day business over a long period of time; therefore, when we come to quote on a specific inquiry from the government or from anybody else, we use that knowledge so gained through our day-to-day routine business and figure our prices accordingly on the specific inquiry at hand."[12]

[8] Koch, Vice President (R) Tr. 32721-22, 32737-38.

[9] Alexander, President (R) Tr. 37277.

[10] Blair, W. R., Sales Manager (El Paso) (R) Tr. 39087-88.

[11] (C) Tr. 474.

[12] (C) Tr. 474.

The last mentioned witness, Stone, testified as follows concerning what occurs in the office of his company when an invitation of any particular size or importance is received from the government, describing their deliberations upon matters such as quantity, specifications and delivery schedules:

> "Well, when an inquiry of any particular size or importance come to one of our offices, naturally, a number of people discuss it. I may or may not be one, in any individual case. Some one, in the course of such consideration, goes over the inquiry item by item with a pad by his side, making a notation of important items. As an illustration, we must first know whether we want to bid on the whole thing, on the entire quantity. We naturally consider what kind of cement it is, what specifications it must conform to. We determine whether or not it is cement that must be held in bins under special test, subject to shipping instructions from the purchaser.
>
> We must know the time of delivery, the over-all time of delivery, and the rate at which deliveries should be made.
>
> Now, taking all of those things into consideration, we begin to put our bid together. In considering how much to bid on, we may take into consideration figures of the kind mentioned here, although that, in my opinion, is deserving of only passing notice.
>
> After bids are in, in many, many instances where large quantities are involved, we use our—we base arguments on our capacity, in trying to induce the contracting officer, if it is a government inquiry, to give us a large share of the business.'"[18]

Numerous other examples of denials by respondents' executives, in equally positive language, of any agreement on sealed bids generally and of any communications or discussions, understandings or agreements in connection with the submission and computation of bids on particular lettings which were received in evidence are cited in the footnote. This includes the denial of any communication or

[18] Stone, Vice President, Universal Atlas (C) Tr. 19079-80.

agreement with competitors by the non-respondent South Dakota State plant on a letting where its bid was identical with others.[14]

In addition to their denials relative to sealed bids such as those described above, responsive executives of most respondents denied any agreement with respect to either prices generally or selling at delivered prices or their different methods of calculating prices. This evidence is set forth in the tabulation of denials in Part XVIII, *infra*, pp. 2912-14.

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[14] Alpha: Postelle, Sales Manager (R) Tr. 25263, 25354-55, 25378, 25400, 25175-76, 25131, 25310, 25201, 25248-49, 25259-63, 25271-72, 25281, 25335.
Fellows, Sales Manager, Alpha (R) Tr. 25805-06, 25511, 25780, 25682, 25728, 25570.
Coogan, Vice President, Alpha (R) Tr. 24194, 24078, 24107-08, 24122, 24127-29, 24389, 24259-60, 24055, 24065, 24042.
Cumberland: Person, Secretary-Treasurer (R) Tr. 39851, 39859, 39864.
Dewey: Moore, Vice President (R) Tr. 47023.
Hawkeye: Manley, General Manager (R) Tr. 41773-74.
Hermitage: McGovern, Sales Manager (R) Tr. 36329-30, 36334-35, 36309-11, 36285-86.
Keystone: Scott, President (R) Tr. 27548-50 (Offer of Proof).
Lehigh: Bowen, Vice President (R) Tr. 27162.
Monarch: Brooke, Vice President (R) Tr. 42337, 42213.
Nebraska: Hoenig, Sales Manager (R) Tr. 42085, 42088.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36517, 36626.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38377, 38406.
South Dakota: Hartley, Sales Manager (R) Tr. 41552 (Com. Ex. 127).
Southwestern: Warren, G. E., Vice President (R) Tr. 28971.
Superior: Davis, President (R) Tr. 29597-98.
Universal Atlas: Sutherland, Ass't to Vice President (R) Tr. 35524, 35544-45, 35550-55, 35556-57, 35560.
Stone, Vice President (C) Tr. 19141-42.
Volunteer: Hanahan, President (R) Tr. 38662-63.
West Penn: McKee, Vice President (R) Tr. 27818.

Various executives testified in detail in explanation of how they independently computed their bids on particular lettings such as by the use of (1) regular commercial prices at the destinations, (2) office price cards showing current or last market quotations, (3) prices filed by competitors with the Code Authority, and (4) prices and land grant freight rates obtained from abstracts of prior government lettings by salesmen or through periodicals and reporting services.[15]

Typical of this testimony is the following:

Coogan, Vice President of Alpha, explained how commercial prices and office price records were used in computing a bid calling for delivery at the Portsmouth Navy Yard, Kittery, Maine:

> "Q. Well, now, again in making out the unit prices that you named on this bid to the various

[15] Alpha: Postelle, Sales Manager (R) Tr. 25353-55, 25357-61, 25211-12, 25228-29, 25234, 25246, 25175-76.
Coogan, Vice President (R) Tr. 24078-79, 24055, 24065, 24051-52.
Fellows, Sales Manager (R) Tr. 25776-78.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39852-53.
Hermitage: McGovern, Sales Manager (R) Tr. 36309-18.
Keystone: Scott, H. M., President (R) Tr. 27548-50 (Offer of Proof).
Kosmos: Horner, President (R) Tr. 36815.
Lehigh: Bowen, Vice President (R) Tr. 27302-03.
Medusa: Dawson, Vice President (R) Tr. 40060.
Nazareth: Robeson, Vice President (R) Tr. 28047-48.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38314, 38306.
Petoskey: Lucas, Vice President (R) Tr. 38750.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37702.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 39367-70.
Warren, G. E., Vice President (R) Tr. 28971.
Universal Atlas: Sutherland, Ass't to Vice President (R) Tr. 35562-65.
Volunteer: Roberts, Traffic Manager (R) Tr. 31904-05.
Whitehall: Elliott, Vice President (R) Tr. 28601-03, 28637-38.

delivery points, did you have any communication of any kind with your competitors as to the prices you would charge? A. We did not. We quoted the same prices that we were currently quoting to those destinations to our commercial customers.

Q. You told us a moment ago that you kept customers' cards, individual customers' cards. This bid shows a schedule, that is, the first schedule in the bid calls for delivery of 200 barrels at Portsmouth, N. H., and it is quoted at a price of $2.03 in paper. Did you keep customers' cards showing your delivered prices at Portsmouth? A. Yes, we do at Portsmouth, but I don't think that that covers delivery to the Portsmouth Navy Yard. That is at Kittery, Maine.

Q. Then how did you arrive at your price of $2.03?

• • •

A. We arrived at our price for quoting for delivery to the Portsmouth Navy Yard by taking the freight rates from the various mills that we used as base figures and took the freight rates and added to that the base figure which we were using at our mills at that time, and quoted that price delivered at the Portsmouth Navy Yard.

• • •

Trial Examiner Norwood: Didn't you make all those prices by the same method?

The Witness: Yes, they were all probably made by the same method.

Trial Examiner Norwood: Yes.

The Witness: But we used in a number of cases where the deliveries are at points where we are commercially quoting our prices, we simply took our commercial prices and used them, but also checked our figures on the form which we retained for our files.

Trial Examiner Norwood: But you make the commercial prices by the same method, don't you?

The Witness: Generally speaking, yes. There are exceptions, of course.

By Mr. Leisure:

Q. Mr. Coogan, are the prices to which you have just been referring, and your explanation as to how you arrived at them, do they appear anywhere on the face of this exhibit? A. Yes. The freight rates are shown on the lefthand corner, and the computation of how we arrived at this particular destination price is also shown."[16]

The same witness explained how a bid to the U. S. Engineers for delivery at Eastport, Maine, was made at both the regular commercial price at that destination and at a lower destination cost figure computed with the use of the control clause and a special freight rate put into effect for the government:

"* * * this was handled in a routine manner. It was an inquiry for a thousand barrels of cement, and we submitted to the Government the same price that we were charging our commercial business, commercial customers at that same destination.

By Mr. Leisure:

Q. Now, this bid shows that your company bid a destination price at Eastport of $3.04 per barrel in paper less 10 cents cash discount. How did you determine that price? A. We took the commercial price that we were charging at that particular destination and quoted that price; our commercial price at that time was $3.29 per barrel in cotton. We deducted 25 cents per barrel in order to arrive at our paper price and quoted $3.04 in paper."[17]

and further:

"Q. That bid which you submitted contains a destination price of $3.04 in paper, and it shows a destination cost of $2.85 in paper. How did you arrive at that price, Mr. Coogan? A. Respondents' Exhibits 757 and 758 shows that information was

[16] Coogan, Vice President, Alpha (R) Tr. 24078-81.

[17] Id., Tr. 24051-52.

passed on to our Boston office by the Boston & Maine Railroad manager advising them that the railroads were going to put in a special rate from Rockland, Maine, to Eastport, 5 cents per barrel—5 cents per hundred, or 19 cents per barrel lower than the previous existing rate.

• • •

A. Well, the letter from our traffic manager shows that the railroads serving our mills had notified him that they would meet this reduction in rate from Rockland, Maine, and that they would grant a 5-cent per hundred reduction in the rates from either Lehigh Valley or our Hudson River Mill, provided shipments were made on Government bills of lading. Therefore, in making up our price which we submitted on the October 18 letting, we quoted a destination price the same as we had quoted on the previous letting, but we also quoted a destination cost of 19 cents per barrel less than the destination price quoted on this as well as the previous bid, and used what has been referred to as the control clause covering this special rate granted by the railroads on this particular movement.

• • •

Q. Now, in reaching that destination cost of $2.85, did you have any consultation in any way with any of your competitors with respect to it? A. No, sir; we used the same price that we had used in the previous letting and deducted from that price the difference between the special rate granted the Government and the commercial rate on which our previous figure had been made up."[18]

Postelle, Sales Manager of Alpha, explained his computation of a bid to the U. S. Engineers at Vicksburg, Miss., involving land grant freight rates and the use of price cards and abstracts of prior lettings:

"We used the Boyles' rate, which will show on our commercial price card as a base figure that we took at that time of 2.10, and the land-grant rate of

[18] Coogan, Vice President, Alpha (R) Tr. 24063-65.

.43244, and it is a very simple computation to show how we arrived at our price of 2.0924, which is shown on our Exhibit 856 A, or, in other words, these exhibits will show that we were using that base and arriving at that figure used the land-grant rate of 44004, which is taken from the process of deduction.

In other words, as I pointed out, when I first started out, that was made up identically on the same basis as all of those Government lettings, where we took our commercial price card and our record of the lowest bidding figure that we could use and obtained these land-grant rates from the previous letting and made our computation accordingly.'"[19]

McGovern, Sales Manager of Hermitage, explained the computation of his company's bid on a letting by the U. S. Engineers for Mississippi flood control work involving barge delivery where the price quoted was the same mill price which a competitor had bid on a prior letting, as follows:

"Q. The Government exhibit on this bid, both show you bid a unit price of $1.30 per barrel. Will you tell us how you arrived at that price? A. My memory is that on the bid prior to this our competitor located over on the river bid this price. We were in hopes that maybe he would raise his price and we could be low.

Q. What competitor was that? A. Marquette.

• • •

Q. Did you have any communications with any other bidder prior to submitting this price of $1.30 f.o.b. mill? A. No, sir."[20]

He said further on cross-examination:

"'Q. Mr. McGovern, do you know whether the price that you bid on this is related to a base point?' A. I would say that that was the same price that Marquette was bidding before at their plant.

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[19] (R) Tr. 25351; and see Resp. Ex. 856 A-K: Alpha's bid.

[20] (R) Tr. 36310-11.

By Mr. Paulson:

Q. What plant of Marquette? A. Cape Girardeau, Mo.

Q. Was there a base at Cape Girardeau? A. I would say there was a mill price there; yes, sir.

Q. What was that mill price? A. I believe it was $1.30.

* * *

Q. What was the base at Cape Girardeau when you submitted this bid? A. My understanding or my records were $1.30 mill price, the same as we bid at Nashville.

Q. You say the Cape Girardeau base was $1.30. A. Yes, sir; and we bid the same price at Nashville, $1.30.

Q. Where was this cement to be used, Mr. McGovern? A. It think it is stated there at points along the Mississippi River, I think from Caruthersville, Mo., down to probably close to Memphis; they use that cement up and down the Mississippi River.

Q. What is the freight rate from Nashville to those points? Can you answer that? A. No, sir; I could not tell you offhand.

Q. How did you contemplate shipping this cement? A. By barge.

* * *

Q. What was the barge rate from Nashville to these points? A. I think you will see, Mr. Paulson, that that was delivered to the Government barges, and they figured their own towing cost to arrive at their destination cost.

Q. Do you know what the Government figured the towing cost to be from Nashville and from Cape Girardeau? A. I think you will find it on that tabulation in making their delivered price.

Q. Did you know what they figured when you submitted your bid? A. I am satisfied it shows on that proposal; yes, sir; what they figured. I believe they show it; they show what their figures, up or down the river, was, so much per ton or per barrel. I think they stipulate that in their proposal.

Q. What I am trying to get at is, how did you know you were going to be competitive when you bid

$1.30 here? A. Well, to be perfectly honest, I did not know that I was. I was just hoping I might be, taking past bids into consideration, I did not have much hope.'"[21]

• • •

Further on direct:

"Q. Mr. McGovern, in determining this price that your company quoted of $1.30 f.o.b. your mill, did you deduct any freight rates from anything to arrive at that price? A. No, sir.

Q. Did you add any freight rate to anything to arrive at that price? A. No, sir.

Q. And had there or had there not been bids received prior to this which the Marquette Company, under similar circumstances, had quoted $1.30 f.o.b. their mill? A. That is my recollection, there had; yes, sir."[22]

Sutherland, Assistant to the Vice President of Universal Atlas, explained the computation of a government destination cost quotation on a letting at Ft. Riley, Kansas, where he used a different price base than that used in computing the commercial delivered price bid on the same letting because he thought the land grant rate from the commercial base would have made his company the high bidder:

"Now, calling your attention to Respondents' Exhibit 2538-R (indicating); you have figured out the application of an estimated land-grant rate that was used by you in determining the so-called Government destination cost at Fort Riley. In connection with that determination, you found that the Bonner Springs base of $1.70, plus its commercial freight rate of 49 cents, would control as to the so-called commercial price; is that so? A. I believe it to be the lowest price that would be submitted by probable bidders at Fort Riley; yes, sir.

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[21] McGovern, Sales Manager, Hermitage (R) Tr. 36312-16.

[22] Id., Tr. 36318.

Q. Is it $2.34? A. Yes, except, you did not include the 15 cents for package.

Q. Yes. From which if you deducted your freight rate from your mill at Independence of 51 cents—— A. Yes, sir; that's 25 cents for paper bags.

Q. Yes. A. And the 10 cents cash discount.

Q. Yes. You would have received a mill net of $1.58? A. That is correct.

Q. But instead of doing that you took the Iola base of $1.70, added to that an arbitrary or estimated land-grant rate of 30 cents per barrel, after disposition of a particular fraction; isn't that correct? A. Well, not instead of; in addition to.

Q. Yes. Well, I say, instead of taking the Bonner Springs base, you did take the Iola base. A. No, no, we bid both ways.

Q. Yes, I know, but you did bid this way? A. (Witness makes no response.)

Q. But when you took the Bonner Springs base you did not add to that the land-grant rates from either that mill or your own mill; did you? A. No, sir; because I thought to do that would make me high bidder, and I wanted to get the business.

Q. So the only way you did use your land-grant rate was to use it in an estimated manner adding it to the $1.70 Iola base, arriving at a so-called destination cost base on Iola of $2.15; isn't that correct?

• • •

A. Well, perhaps to clarify that it is true that to the so-called Iola price base of $1.70 [exclusive of paper sacks] we added 30 cents land-grant freight, that being the amount of land-grant freight estimated by the Union Pacific Railroad as being applicable from Iola to Fort Riley, the resultant combination of which I thought would be the lowest price submitted at this particular opening, and I, therefore, named a destination cost to meet that figure.

By Mr. MacIntyre:

Q. That is, of $2.15? A. That's right.

Q. That is, you thought it would be submitted by your competitors? A. That is correct.

> Q. And you proceeded, therefore, to deduct from that $2.15 a land-grant rate of .389918 as applicable from your mill at Independence to Fort Riley, giving you a mill net of $1.610082,[23] is that correct? A. That's correct.''[24]

Robeson, Vice President, Nazareth, testified as to how he followed up public lettings to find out what bids had been submitted:

> ''• • • In the first place, if there is no reporting services available, why, then, we usually have the lettings attended by one of our men, who takes off the results and reports them to us. In a great many cases, now, in the recent years, there have been agencies that spring up that offer to sell such a service, and, wherever possible, we buy those services, and save the time of our men going to the lettings.
>
> Q. You say 'service';—are they designed particularly for the cement manufacturers? A. No, sir; I have in mind one in Harrisburg, and they report on everything from a keg of nails—to dynamite, I guess.''[25]

Explanations of computations such as the foregoing were supported by work sheets, price cards and other contemporary company records. A list of such of these records as were received in evidence and of related testimony of respondents' executives, vis-a-vis the invitations to bid to which they relate, is set forth in Tabulation A commencing at page 903, *infra*. Early in respondent's case the Trial Examiner, upon objection by Commission's counsel, curtailed the introduction in evidence of such records by respondents as ''cumulative'' and ''a waste of time'' al-

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[23] Before deducting 10c. cash discount.

[24] Sutherland, Ass't to Vice President, Universal Atlas (R) Tr. 35562-65.

[25] (R) Tr. 28047-48.

though respondents' counsel urged that they related to the very bids put in evidence by the Commission. The record shows the following discussion between the Trial Examiner and counsel during the examination of Coogan, Vice President of Alpha, the second witness who testified on behalf of the respondents:

> "Trial Examiner Norwood: I think I shall reject as cumulative any further cards and figures here unless they demonstrate a different method. In other words, if you pick out another destination where the price is figured by the same method as one of the methods you have shown here, I think that it is cumulative and we should not waste our time on it.
>
> Mr. Porter: Your Honor, the Government put in 2,500 different bids.
>
> Trial Examiner Norwood: Yes.
>
> Mr. Porter: All cumulative to the same thing. We have got to meet the evidence on each bid.
>
> Trial Examiner Norwood: I understand that. And your witness may say that the rest of them were arrived at by the same method.
>
> Mr. Leisure: If your Honor pleases, I want to make clear that in offering this documentary evidence, we do it for two reasons: In the first place, we deny that there is such a thing as a system, as described by Counsel for the Commission. In the second place, when the Government has put in bids, and we have documentary evidence which shows how we arrived at the bid which the Government put in, I do not feel that it can be called cumulative when we are merely following along in the Government's footsteps.
>
> Now, if they want to withdraw any of those bids, so that we will not have to spend any of that time, I shall be very happy to discontinue making the offer; but so long as the bids remain in the record, which the Government has put in, and we have separate documentary evidence showing that we did not arrive at the final result as a matter of collusion, I want to urge your Honor in every way that I know how that I feel that for us to have a fair trial we

must have the opportunity to meet those charges and that evidence presented by the Government.

Trial Examiner Norwood: You may show these methods but you need not do it by constantly repeating where no new information is presented here in a manner that will prolong this investigation and encumber this record."[26]

Respondents moved to adduce "a representative selection of the evidence so rejected" (Motion, Subj. I, p. 24, *et seq.*). In view of the concession by Commission's counsel and the Findings which are quoted at pages 704-705 (*supra*) as to non-exchange of prices and non-agreement on prices on particular lettings respondents do not press this part of their motion.

Tabulation A

Contemporary Company Records and Related Testimony of Respondents' Executives Received in Evidence in Explanation of Bids.

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibit
Coogan, Vice President, Alpha:			
753	Letter	24050	165
754	Price Card	24052-55	267 B, 268 F
755	Work Sheet	24056-59	267 B, 268 F
757	Freight Rate Memo.	24059-65	268 F
759	Copy of Bid	24061, 24062	268 F
761	Letters	24066, 24069	1099 B
762	Copy of Bid	24070-71	1099 B
763	Price Card	24081-83	1099 A-2 A, 386 G, H
764	" "	24083-84	" "
765	" "	24090-94	" "
766	" "	24093-94, 24096-98	" "

[26] Tr. 24094-95.

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibit
767	Price Card	24098-99	1099 A-2 A, 386 G, H
768	" "	24105	" "
769	Copy of Bid	24111-12	386 G, H
770	Letters	24119	386 G, H
771	"	24119	386 G, H
772	"	24120-21	386 G, H
773	Work Sheet	24120	386 G, H
774	Price Card	24122-23	1099 A-2 A, 386 G, H
779	Letter	24141-42	1099 W
783	Price Card	24146-47	372 A
810	Filing Price with Code Authority	24262, 24265	178
813 A, B	" "	24265-66	178
814	" "	24267	178
Postelle, Sales Manager, Alpha:			
817	Notice from Navy Department	24038-40, 24043	1098, 1099 A-2 A
818	Letter	25041, 25043	1098
819	Price Card	25041, 25043-45	1098
821	Land Grant Rates	25052-54	789
822	Letters	25054	789
824	"	25056-57	789
829	Copy of Bid	25085-88	789
830	Price Card	25090-91	789
835	Telegram	25115-18	182 A
836	Price Card	25119-20, 25236	156, 157, 182, 187, 776

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibit
839 A, B-840	Work Sheets	25122-25, 25128-29	156, 157, 182, 187, 776
842	Land Grant Rates	25134, 25153	769
844	Letters and Telegrams	25154, 25169-70	769
845	"	25171	769
846	"	25171	769
848-849	"	25177	771
851	"	25179	771
852	"	25180-81	771
853 A-C	Work Sheets	25191-93	771
854	Copy of Bid	25193	771
855	Letters and Telegrams	25194, 25197-98	771
856	Copy of Bid	25202-03	773
859	Price Card	25218, 25220-22	180 A, 773, 779, 781, 784, 792
860	Letter	25232-33	185 A, 776
862	Work Sheets	25233-34	776
863	Copy of Bid	25235-37	185 A, 776
864	Report on Letting	25246-48	185 A, 776
866-867	Letters	25249-50	777 A
870	Work Sheet	25256-59	777
871-872	Copies of Bid	25259-61, 25263	777 A
874	Work Sheet	25265-67, 25269	780
875	Telegram	25268-70	780
876	Letters	25273	187 A

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibit
877 A-C	Work Sheets	25273-76	187
878	" "	25275-77	187
879, 880	Letters	25278	187 A
886-887	Land Grant Rates	25292	792 A
888	Copy of Bid	25298-300, 25302	792 A
891-892	Land Grant Rates	25301-02	792 A
893-894	Letter and Copy of Bid	25311-12,	156, 157
895-896	Destination Cost Card	25327-33	156, 157
897	Work Sheet	25335-37	180 A
898	Copy of Bid	25338	1084 B
899	Destination Cost Cards	25339-41	1084 B, 1096 A-C
900	" "	25339-41	1084 B
901	" "	25339-42	1084 B, 1096 A-C
902-906	Price Cards	25342-47, 25372, 25393	1083, 1084 B, 1805 A-C, 1086, 1087 A, B, 1094, 1096 A-C
907	" "	25343	1084 B
908	Copy of Bid	25353-55	1094
909	Form Letter	25355, 25363, 25369	
910	Destination Cost Cards	25356-57, 25359-62	1094
911	" "	"	1084 B, 1094
912-913	" "	"	" "
914	" "	"	1094, 1087 A-B, 1096 A-C

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibit
915-919	Price Cards	25361	1083, 1084 B, 1805 A-C, 1086, 1087 A, B, 1094, 1096 A-C
920	Copy of Bids	25363	1083
921	Destination Cost Cards	25363-64, 25367-68, 25383-84	1083, 1086, 1092
922-924	" "	25363-67, 25383-84	1083
925	" "	25363-64, 25367-68, 25376, 25383-84	1083, 1086, 1093
926-927	" "	25363-64, 25367	1083
928	" "	25363-64, 25367-68, 25376	1083, 1092
929-930	Price Cards	25363-64, 25367, 25375-78, 25384	1083
931	" "	25364, 25380	1090, 314 Q
932-933	" "	25364	1083
934	" "	25364, 25375, 25384	1083, 1086, 1092
935	" "	25364	1083
936	" "	25364, 25375, 25384	1083, 1086, 1092
937-938	" "	25364, 25375	1083, 1092
939	Copy of Bid	25369-70	1087
940	Destination Cost Cards	25370	1087 A-B

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibit
941-943	Destination Cost Cards	25370, 25393	1094, 1087 A, B, 1096 A-C
944	Price Cards	25370	1087 A, B
945	" "	25370, 25393	1085 A-C, 1087 A-B, 1094, 1096 A-C
946	" "	25370-71, 25393	1085 A-C, 1087 A-C, 1094, 1096 A-C
947	Copy of Bid	25373, 25377-78	1092
949	Destination Cost Cards	25373, 25378-80	1083, 1086, 1092
951	" "	25380	1083, 1090
951	Price Cards	25380	314 Q
952	Destination Cost Cards	25380	1083, 1090
953	Price Cards	25380	1083, 1090, 314 Q
954	" "	25380	1083, 1090
955	Copy of Bid	25381	1086
958	Letter	25382	1086
962-967	Destination Cost Cards	25385	1088
968-973	Price Cards	25386-87	1088
974	Copy of Bid	25390	1085
976	Destination Cost Cards	25390	1085 A-C
977	Price Cards	25390	1085 A-C, 1087 A-B
Fellows, Sales Manager, Alpha:			
1059	Copy of Bid	25731	770
1060-1070	Letters	25736-49	783
1071	Land Grant Rates	25739-49	783
1072	Letters	25739-49	783

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibits
1074-1076	Letters and Telegrams	25760, 25764-65, 25769-72, 25774-80	790
1077 A-Q	Work Sheets	25758	790
1078	Copy of Bid	25758	790
1081	Work Sheets	25784-89	795
1082	Copy of Bid	25784-85	795
Bowen, Vice President, Lehigh:			
1315	Copy of Bid	27030-34	1095
1315 A, B	Ocean Freight Rate	27030-34	1095
1315 C	Work Sheets	27030-34	1095
1316 A	" "	27037-38	372 A
1318	Land Grant Rates	27040-42	792 A
1319	Abstract	27041	792 A
1349	Copy of Bid	27044-47	277 FF
1350	Work Sheet	27047-49	277 FF
1351-1352	Letters	27048	277 FF
1353	Telegram	27052-53	1098
Scott, President, Keystone:			
1397, 1398	Copy of Bid	27530, 27539-42	268 F
1399	Work Sheet	27530, 27532, 27539-42	267 B
1400	Copy of Bid	27542-47	268 F

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibits
Warren, Vice President, Southwestern:			
1722	News Clipping	28986-87	178 A, B
1742	Dealers Invoice	29022-28	373 A
1743	Price Cards	29022-28	373 A
Roberts, Traffic Manager, Volunteer:			
2223	Price Cards	31734-39	1099 A-2 A
2281 A, B	" "	31878, 31883	1099 C
2284 A	Work Sheet	31894-95	180 A
2286 A-C	" "	31899-900	156, 157
2287	Copy of Bid	31901-03	314 Q
Warren, Vice President, Bessemer:			
2334-2335	Copy of Bid	32302-08	1089, 373 A
Sutherland, Asst. to Vice President, Universal Atlas:			
2535	Work Sheets	35507-10	366 B
McGovern, Sales Manager, Hermitage:			
2704	Copy of Bid	36294-95	789
2710	Price Card	36327, 36333	171
Letzkus, Sales Manager, Pittsburgh Plate Glass:			
2885 F-G	Shipping Instruction	37924	373 A.
Browder, Traffic Manager, Penn-Dixie:			
2918	Copy of Bid	38366	401
2919 A-D	Filing Prices with Code Authority	38374, 38376	401
2920 A-C	Work Sheets	38376-82, 38389, 38391	401
2921	Letter	38392-403	401

Respondents' Exhibit	Description	Transcript Reference	Pertaining to Bid on Commission's Exhibits
Colburn, Vice President, Marquette:			
2993	Copy of Bid	39030	193
2995	" " "	39030	192, 794, 793
Blair, Sales Manager, Southwestern:			
3001	Copy of Bid	39101-03	119 B
3004	" " "	39112-16	170 A
Dannelly, Vice President, National:			
3046	Work Sheets	39664-67	180 A
3048 A	" "	39669-70, 39672-73	156, 157,
Dawson, Vice President, Medusa:			
3182	Copy of Bid	40290	303 D
3688	" " "	47823	387 A, B

The following are typical examples of worksheets, price cards and destination cost cards which were introduced in evidence by particular respondents in explanation of the independent procedures which they followed in arriving at their quotations on sealed bids:

Alpha worksheet made up for War Department letting opened at Memphis, Tennessee, on February 4, 1931:[27]

P 45

RX 874

	Cairo	Hickman	Memphis
F.O.B. Boyles	2.01	2.01	2.01
Boyles to Rail	.4900	.45828	.39558
	2.5000	2.46678	2.40638
Less Phoenicia Rib	.51756	.54566	.41002
	1.98644	1.92260	1.99556

Our bid

Alpha price card used in Birmingham office giving its commercial price at Pensacola, Fla., over a period of years:[28]

RX 819

p. 2-A

16-40

PENSACOLA

FLORIDA

SPUGARI

DATE	B'HAM CWT.	B'HAM BBL.	CLINCHFIELD CWT.	CLINCHFIELD BBL.	JACKSONVILLE CWT.	JACKSONVILLE BBL.	LEEDS CWT.	LEEDS BBL.	PENSCOLA CWT.	PENSCOLA BBL.	SAVANNAH CWT.	SAVANNAH BBL.	TAMPA CWT.	TAMPA BBL.	BRVN CWT.	BRVN BBL.	NORL CWT.	NORL BBL.	SPEEDS MOBILE CWT.	SPEEDS MOBILE BBL.	PRICE	MADE ON	CHANGE
2-12-31	15½	59	17½	67	18½	70	16	61			19½	74	20½	78							234	PENSA	
3-2																					234	—	
9-1																					231	—	
5-13																					230	BIRM	
10-15													24	91							230	—	
1-4-32	16½	63	18½	70	19½	74	17	65			20½	78	25	95					23½	69	234	BIRM	
6-1-32			17½	67																	220	MAR 12	
7-18-32																					234	BIRM	
8-13																					260	MIGS	
11-14-32																					263	B200	
5-9-33													24	91							263	—	
7-13																					278	— 215	
7-18																					278	—	
10-1-33	15½	59	16½	63	18½	70	16	61			19½	74	24	91					25½	66	249	B140 Pep	
6-4-34																					191		
6-4-35	16½	63	17½	67	19½	74	17	65			20½	78	25	95					26½	69	253	—	
10-27-36					19½	74															253	—	
10-29-36																	16	61			251	NO140	
12-7-36																					216	Adv	
1-1-37	15½	59	16½	63	18½	70	16	61	14	53	19½	74	24	91			15	57			215	—	
11-15-37	16½	63	17½	67			17	65	15	57	20½	78									194 215	—	
2-28-38	17	65	18	68			18	68	15	57	21	80			21	80					215	—	
9-22-38																					241	Adv 140	
1-11-39																					241	Mp	

[28] Postelle, Sales Manager (R) Tr. 25041.

Alpha Birmingham office land-grant and destination cost card prepared in connection with U. S. Engineer's letting for Greenville, Miss., of October 1, 1937:[39]

F 63 Com. Price $2.33 bbl bulk RX 895

DESTINATION Greenville, Miss.

$1.70	Mill price in	Bulk at Boyles, Ala.
.40559	land grant rate to destination	
$2.10559	DESTINATION COST in	Bulk

MILL	CENTS PER CWT	CENTS PER BBL	QUOTED BY
Boyles, Ala.	10.787	.40559 (376 lbs)	IC Chicago
No. Birmingham	11.039	"	"
Leeds, Ala.	12.89	"	"
Phoenixville	10.934	"	"
OFFICE Marquette	14.566	"	"
St. Louis	16.379	"	"
QUANTITY Mobile	11.156	"	"

U. S. Engineer Office, Vicksburg, Miss.

DATE FILED

BIDS OPENED 10 1-37

[39] Postelle, Sales Manager (R) Tr. 25311, 25337.

Out of the volume of bids referred to in the record over the 13 year period from 1925 forward, the Commission introduced in evidence isolated memoranda containing inference of exchange of price information on four sealed bids. Three of these are interoffice communications of Lehigh, one in 1928[30] and two in 1931.[31] The fourth is an unsigned paper dated in 1930 from the files of Ralph Bristol, an officer of the non-respondent Utah Sales Company and also of the non-respondent Utah-Idaho Cement Company.[32]

The Lehigh memorandum in 1928 referred to a letting on June 12, and was dated two days thereafter. It described a "Greenville price of $2.33866 per barrel" quoted by Penn-Dixie involving land grant rates and said in part:

> "We have been in conversation with Brown [Southeastern manager of Penn Dixie] about it and he admits that they made a 'mess' of their bid and blames it on his office. There should not have been any possibility, though, of misunderstanding or of not knowing how to figure the bid. We had the matter up before with them very explicitly in connection with the bids that were taken in January. Their theory of figuring was much the same on that occasion as you will note by referring to Mr. Dent's [a sales representative of Lehigh] report of January 31st."[33] [matter in brackets added]

The earlier of the 1931 items was an interoffice letter of Lehigh dated April 24, relating to a Navy letting at Pensacola opened on April 16.[34] It said that Lehigh and Lone Star both quoted $1.72; that Alpha bid *$1.712* and was low

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[30] Com. Ex. 184 I.

[31] Com. Exs. 385 A, 1042 E.

[32] Com. Ex. 1197.

[33] Com. Ex. 184 I.

[34] Bowen, Vice President, Lehigh (R) Tr. 27049.

and received the award and that Florida quoted $1.715 but was high due to a higher rate. As a matter of fact it is shown by the abstract of bids introduced in evidence by the Commission that Alpha did not bid $1.712 but $1.717.[35] And Alpha's worksheet and the testimony of its Sales Manager, Postelle, also show the price was $1.717.[36] The interoffice letter said further that Alpha's quotation was "an absolute contradiction of what we were given to understand prior to submitting of the bids. Our reason for quoting $1.72 is because we felt reasonably certain that Lone Star would use that figure and because we were directly advised by Alpha that $1.72 is the figure they would use."[37] Postelle, Sales Manager of Alpha, testified that the statement as to advice by his company was "absolutely wrong" and that "We gave no information to our competitors, and never have given any information to our competitors."[38] Bowen, Vice President of Lehigh, testified that the Birmingham office which wrote the letter had no discretion with regard to the bid and was bound to follow instructions of his office at Allentown; that his office gave instructions by wire to Birmingham on the day before the letting to bid the $1.72 figure; and that his office had no information "whatsoever" prior to the opening of the bid as to how competitors were bidding or intended to bid.[39]

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[35] Com. Ex. 1098.

[36] Resp. Ex. 818;
(R) Tr. 25047.

[37] Com. Ex. 385 A.

[38] (R) Tr. 25046.

[39] (R) Tr. 27051-54.
Resp. Ex. 1353.

The third item was an interoffice telegram of Lehigh dated July 23, 1931 which said:

> "* * * U. S SHIPPING BOARD NORFOLK FIFTEEN HUNDRED BARRELS TEN CENTS UP. STOP NORFOLK DEALERS HAVE HANDLED WITH OTHER MANUFACTURERS. AND ALL AGREE DO LIKEWISE STOP WE HAVE FAIR CHANCE FOR HALF THE BUSINESS FROM DEALERS. * * *"[40]

Bowen denied any agreement or understanding "with dealers or with other manufacturers" with regard to price on this matter and stated that the transaction was handled "on the basis of our statement to dealers on March 16, 1931 as to what our practice would be." He said it was "the only case of its kind" and simply one of "desire to get the better of our competitors * * * by improving our position with the Norfolk dealers."[41]

The paper from the files of the non-respondent Utah Sales Co. was dated May 18, 1930 and bore the typed names of representatives of four companies which bid on four Reclamation lettings opened on May 28 and in June, 1930. It contained initials which conformed to mills of four bidders, namely, Idaho, Oregon, Utah-Idaho and Union, over lists of figures headed by each project. The lists set forth prices in cloth less package and discount, plus freight, giving costs at destination. Comparison of the memorandum with the prices bid on the lettings shows that they are the same except for a few minor variations.[42] H. O. Warner whose office handled purchases by the Reclamation Bureau for Union and who personally signed Union's bids thereon did not recognize the paper and had never seen it. He said it looked like a study of freight rates from shipping points.[43] Knappenburger, Vice President of Oregon, an

[40] Com. Ex. 1042 E.

[41] Bowen, Vice President, Lehigh (R) Tr. 27163.

[42] Com. Ex. 1197; and see Com. Ex. 1328: Tabulation of Bids.

[43] Warner, Sales Manager, Colorado (C) Tr. 13838, 13908-10.

abbreviation of whose name appeared on the paper, said that he knew the other individuals whose names it contained but that he had not met with them to discuss those matters.[44]

4. Awards

a. Lowest Laid-Down Cost at Destination

The following officials connected with government purchasing agencies testified that they are interested primarily in the lowest comparative laid-down cost of cement at the point of use and that they figure their awards on that basis:

Custer, Senior administration assistant, Bureau of Supplies & Accounts, Navy Department;[1]
Rice, Attorney, U. S. War Department;[2]
Fry, Purchasing Officer, U. S. Department of Interior;[3]
Harkness, Florida State Procurement Officer, Procurement Division, U. S. Treasury Department;[4]
Hayghe, Chief of Traffic, Procurement Division, U. S. Treasury Department;[5]
Peoples, U. S. Director of Procurement;[6]
Taylor, Assistant, Chief of Engineering Division, U. S. Bureau of Reclamation;[7]
Ashley, Chief of the Division of Purchases, U. S. Department of Agriculture.[8]

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[44] Knappenburger, Vice President, Oregon (C) Tr. 8478-79.

[1] (C) Tr. 21306-66, 2569-71.

[2] (C) Tr. 1771, 1802-06.

[3] (C) Tr. 201-02, 224-26.

[4] (C) Tr. 4930-34.

[5] (C) Tr. 2452-53.

[6] (C) Tr. 10347, 10455-60, 10307-23.

[7] (C) Tr. 245.

[8] (C) Tr. 5460-62.

Typical of their testimony was that of Rice, Attorney in the War Department:

"Q. So that it was the rule that in making awards, the thing that you were primarily and essentially interested in was what it would cost the government for cement at the point of delivery? A. That is correct.'"

• • •

"Q. You do not have to be an economist to know that the Government in figuring out who the successful bidder will be, figures at the point of destination rather than somewhere else? A. Oh, no. We have got to figure that.

Q. That does not take an economist to determine that, does it? A. No.

Q. And it is a fact, isn't it, that you figure your cost to you laid down at the point of destination? That is the way you determine who the lowest bidder is, isn't that so? A. That is the cost we are interested in knowing, yes.

• • •

Q. But let us suppose that you got a quotation from the mill and that was higher than some other mills—let us take two mills, and one mill is higher, mill No. 2 is higher at the mill than mill No. 1, but mill No. 2 is cheaper at the point of destination than mill No. 1. Which contract do you execute? A. We are going to take the one that is cheaper at destination.

Q. That is right. So the sale takes place at the market place of destination, doesn't it? A. I think the sale is consummated at the point where we take title.

Q. Then at least you will admit this. You do not buy at the mill because in that case you did not buy at the place where the mill was the lowest, isn't that so? A. In that particular case, having bought it at destination, that would probably be what you call the market place, but we only figure the total delivered cost, because that is what we are governed by,

[9] (C) Tr. 1771.

what the article is going to cost delivered to the point where it is required.

Q. You say you did it in that case. Can you give me any instance where the Government figures the final cost not at destination, but figures it at the mill? Give me one single instance where it determines the lowest bidder any place else except at destination cost? A. No, we consider the transportation cost in making the awards.

Q. You consider those elements, but in making your award, the determination of the lowest cost to you is figured at destination, is it not? A. That is correct."[10]

In spite of the fact that awards are made on such basis the same witness testified that he never gave any consideration to the fact that bidders would want to quote at the place where the award is determined.[11]

Executives of numerous respondents testified that their experience also was that awards were made on the basis of the lowest laid down cost at destination.[12] One said that this has been the case since the early days.[13] Several ex-

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[10] Rice, Attorney, U. S. War Dept. (C) Tr. 1804-06.

[11] Id., Tr. 1734-36.

[12] Alpha: Coogan, Vice President (R) Tr. 24194.
Fellows, Sales Manager (R) Tr. 25802-03.
Bessemer: Warren, F. B., Vice President (R) Tr. 32171-72.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39850-51.
Edison: Sweeney, Vice President (R) Tr. 35640.
Lehigh: Bowen, Vice President (R) Tr. 27074.
Lone Star: Koch, Vice President (R) Tr. 32672.
Neylan, Ass't General Sales Manager (C) Tr. 6636-37, 6103-06, 6664-65, 6675-79.
Medusa: Dawson, Vice President (R) Tr. 40058-59.
Nazareth: Robeson, Vice President (R) Tr. 28048-52.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38502.
Petoskey: Lucas, Vice President (R) Tr. 38801-02.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37700-01.
West Penn: McKee, Vice President (R) Tr. 27867.

[13] Koch, *supra*, Tr. 32672.

ecutives testified that they never knew of an award on any other basis[14] and that all of their customers bought on that basis,[15] although there were instances of complaints such as that of Universal Atlas that it was the low bidder on Conchas Dam, New Mexico, but did not receive the award.[16]

Government officials testified that the specifications in their invitations state in effect that the net delivered cost shall be the basis for awards. They said that there is no secret about it and that the bidders are well aware that they cannot be successful if they bid higher than competitors on the basis of the delivered cost.[17] Examples of invitations which contained provisions for comparison of bids on the basis of the lowest delivered cost are found in the record.[18]

Several officials testified that rulings of the Comptroller General and of the Attorney General required them to accept the bid which resulted in the lowest available net charge against public monies.[19] Such bid is determined by the ultimate cost to the government and the bidder whose price plus freight produces the lowest aggregate

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[14] Sweeney, Vice President, Edison (R) Tr. 35640.
Warren, F. B., Vice President, Bessemer (R) Tr. 32172.

[15] Dawson, Vice President, Medusa (R) Tr. 40056-57.
Ackerman, Sales Manager, Lawrence (C) Tr. 7279-82.

[16] Stone, Vice President, Universal Atlas (C) Tr. 19148-52.

[17] Rice, Attorney, U. S. War Dept. (C) Tr. 1809-10.
Taylor, Ass't Chief of Engineering Division, U. S. Bureau of Reclamation (C) Tr. 1313-22.

[18] *E.g.* Com. Exs. 168 C, Par. B; 180, Par. 6; 171, Par. 6; 169 C.
And see testimony of Rice, Attorney, U. S. War Dept. (C) Tr. 1734-36, 3535-36.

[19] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 180-84.
Peoples, U. S. Director of Procurement (C) Tr. 10307-23, 10500-02.
Ashley, Chief of the Division of Purchases, U. S. Dept. of Agriculture (C) Tr. 5460-62.

cost.[20] Botl the Comptroller General and the Attorney General have ruled that the purpose of the statutory provision for advertising bids (R. S. §3709) is to ascertain the lowest responsible bidder[21] and the Comptroller General has ruled that the cost of delivery should always be considered in determining the lowest bid.[22]

In keeping with the last mentioned ruling and since the cost at destination controls, various officials testified: In figuring the total cost to the government they take into consideration the cost of transportation.[23] They add freight to f.o.b. mill bids and do not award on the basis of the "true" mill price.[24] They do not distinguish between the cost of cement and the cost of the transportation.[25] They compute and add land grant rates to f.o.b. mill bids to determine which results in the cheapest cost.[26] The government wants f.o.b. mill bids when land grant rates apply in order to do its own figuring so as to determine the cheapest method of delivery and to that extent only the cost at destination may turn on the cost at the mill.[27] One

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[20] Ashley, Chief of the Division of Purchases, U. S. Dept. of Agriculture (C) Tr. 5460-62.

[21] Peoples, U. S. Director of Procurement (C) Tr. 10307-23.

[22] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 180-84.

[23] Custer, Senior Administration Assistant, Bureau of Supplies & Accounts, Navy Dept. (C) Tr. 2569-71.
Simpson, Rate Clerk, I.C.C. (C) Tr. 9531.
Rice, Attorney, U. S. War Dept. (C) Tr. 1771.

[24] Harkness, Florida State Procurement Officer, Proc. Div., U. S. Treas. Dept. (C) Tr. 4930-32.
Peoples, *supra*, Tr. 10308-11.
Hayghe, Chief of Traffic, Proc. Div., U. S. Treas. Dept. (C) Tr. 2452-53.
Rice, *supra*, Tr. 1754-56.

[25] Harkness, *supra*, Tr. 4932-33.

[26] Hayghe, *supra*, Tr. 2212-13.

[27] Fry, *supra*, Tr. 213-14, 231.

official testified that manufacturers for the same reason, take the freight rate into consideration in their bidding.[28] Another official gave an example of the importance of the transportation cost which amounted to between $9,335 and $17,715 on a total destination cost of $50,175.[29] In like manner all elements which affect the lowest laid-down cost at destination, including variations in terms of sale, are considered in making awards.[30]

Government officials and executives of respondents alike testified that the lowest cost at destination controlled awards regardless of the type of invitation or bid and that a low bid at the mill will not prevail where another produces a lower cost at the destination. Rice, Attorney in the War Department, so testified and said he did not recall any instance when the lowest bidder was determined other than by comparison of cost at destination and that the War Department does not figure final cost at the mill.[31] Hayghe, Chief of Traffic, Procurement Division, testified that the government is interested in the lowest possible cost regardless of whether the bids on f.o.b. mill, f.o.b. destination or destination cost figure.[32] Peoples, U. S. Director of Procurement, testified that in cases of f.o.b. mill bids he determines the lowest cost and bidder by adding the freight to the destination and that the lower f.o.b. mill bid may not give the lowest laid down price at

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[28] Taylor, Ass't Chief of Eng. Div., U. S. Bureau of Reclamation (C) Tr. 1313-22.

[29] Rice, Attorney, U. S. War Dept. (C) Tr. 1697-99.

[30] Taylor, *supra*, Tr. 1307-12.
Custer, Senior Administration Assistant, Bureau of Supplies & Accounts, Navy Dept. (C) Tr. 21307-08.

[31] Rice, *supra*, Tr. 1802-06.

[32] (C) Tr. 2452-53.

[33] (C) Tr. 10310-11.

the destination.[33] Taylor, Assistant Chief of the Engineering Division of the Bureau of Reclamation, and Ashley, Chief of the Division of Purchases of the Department of Agriculture, testified to the same effect and Taylor added that the possibility of the low mill bidder losing the award was a good reason for bidders wanting to figure the price at the destination.[34] Simpson of the I.C.C. testified that no matter whether the price is made at the point of origin or delivery it is the ultimate cost that controls the purchaser.[35]

As early as 1927 Lone Star protested that it was unfair of the government to request f.o.b. mill bids while awarding on the basis of the lowest cost at destination and to disregard whether bidders figure their prices at the destination.[36] For the same reason Lone Star considers f.o.b. mill bidding useless and has never gotten any business from quoting that way.[37]

Elcock, Vice President of Southern States, testified and identified records showing that on several occasions his company was the low mill bidder but did not receive the award.[38] Warren, Vice President of Bessemer, said that in every case that he knew the government had bought at the lowest cost at the destination as against the lowest mill price, and that it had requested delivery at destination on an f.o.b. mill bid.[39] A Monarch salesman's report was identified which showed that the government declined to con-

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[34] (C) Tr. 1307-23, 5460-62.

[35] (C) Tr. 9507-08.

[36] Neylan, Ass't General Sales Manager, Lone Star (C) Tr. 6664-65. Koch, Vice President, Lone Star (R) Tr. 33226, 32676, 32694.

[37] Neylan, *supra*, Tr. 6668, 6675-79.

[38] (R) Tr. 37588.
Resp. Exs. 2829-2834 for id.: Invitations and Notices of Awards.

[39] (R) Tr. 32172, 32400-01.

sider the f.o.b. mill price although the invitation called for it and on the contrary favored the destination cost bidder.[40] Other testimony to the same effect was excluded.[41]

b. Awards in Tie Bids

i. *By Lots*

Where identical bids are submitted they are first analyzed to see if any particular bid is beneficial. If not then the award is made by lots.[1] By decision A-54,083 the Comptroller General ruled in March 1934 that there was no legal objection to awarding by lots in tie bids if there was no possible choice on the basis of quantity or cost of transportation.[2] An official of the Department of Agriculture testified that following this ruling it was usual to make awards by lots in such cases,[3] and Army regulations contained a like requirement.[4] The Florida State Procurement Office misinterpreted S.P.O. Bulletin 72 of January 6, 1936 which instructed that awards should be made f.o.b. point of origin where land grant savings could be effected and was making awards to the most distant mills with the lowest derived price under destination cost (control clause) bids. On presentation of the facts to Captain

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[40] Brooke, Vice President, Monarch (R) Tr. 42269-70. Resp. Ex. 3434 A for id.

[41] Nelson, J. L., Vice President, Wolverine (R) Tr. 36072.

[1] Rice, Attorney, U. S. War Dept. (C) Tr. 1453.
Ashley, Chief of the Division of Purchases, U. S. Dept. of Agriculture (C) Tr. 5383-84.

[2] Rice, *supra*, Tr. 1697-99.

[3] Ashley, *supra*, Tr. 1452-53.

[4] Rice, *supra*, Tr. 1697-99.

Collins, Assistant Director of Procurement, he agreed that the awards should be by lot.[5]

Fry, Purchasing Officer of the Department of Interior, who testified that tie bids did not disturb his department until the use of the control clause, also said that ties were not uncommon in other lines including textiles.[6] He testified elsewhere that although there were times when two bidders quoted the same price in textiles, generally speaking they do not have tie bidding in that industry, nor in furniture, kitchenware, engine pumps and many other items.[7] He conceded that in the industries which he mentioned freight was not a very important part of the destination price. Moreover, he said he was not familiar with Secretary Ickes' testimony before a Senate Committee in which the Secretary named the following as other industries representative of those submitting tie bids: kitchen equipment, pumps, valves, typewriters, steel lockers, and school furniture.[8]

Exceptions to the practice of awards by lots in case of tie bids appear below.

ii. *To Most Distant Bidder*

Rice, Attorney in the War Department, testified that on a letting where bids were received on October 1, 1937 by the District Engineer at Vicksburg, the invitation provided that if a bidder failed to quote an f.o.b. mill price the gov-

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[5] Reiter, Vice President, Universal Atlas (C) Tr. 4371-73.
Com. Ex. 201 A-C: Letter, 3/20/36, Traynor, Vice President, Florida to Reiter, General Manager, the Institute and Telegram in reply.
Com. Ex. 202-2 D: Letter, 4/16/36, Collins, Ass't Director of Procurement, U. S. Treasury Dept. to Reiter, *supra*.
Com. Ex. 374: S.P.O. Bulletin 72.

[6] (C) Tr. 229-30.

[7] Id., Tr. 189.

[8] Id., Tr. 199.

ernment should have the right to determine such price by deducting the commercial freight from the destination price. He said the War Department carried out the "intent" of the provision by making its award to the bidder whose mill was farthest from the destination. This was not a new policy but had been done by the War Department on occasions quite some time earlier.[9] The Department of the Interior established a policy of making awards on ties in this manner on order of Secretary Ickes and has continued it.[10] The effect is to pay the lowest net direct to the mill[11] and the policy was intended to spread the benefits of government purchases by paying a larger portion of the total cost to the railroads. In this connection there was testimony by an official of the War Department that it was a method of warfare aimed at securing greater land grant benefits to the government and that the United States Engineers were not interested in obtaining quicker deliveries by buying from the nearest mill as deliveries were satisfactory anyway.[12] However, Admiral Peoples testified that he often found in buying f.o.b. mill there was an advantage in the delivered cost in awards to the mill nearest the point of use.[13] It has been his experience that a mill 500 miles away can't deliver as cheaply as one nearer.[14] (Compare subdivisions immediately following)

iii. *To Nearest Bidder; to Mill Able to Supply; Divisions of Awards; Miscellaneous*

In specified instances Taylor, Assistant Chief of the Engineering Division of the Bureau of Reclamation, testified

[9] Rice, Attorney, U. S. War Dept. (C) Tr. 1439, 1443-44, 1454.
Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 225-26.

[10] Fry, *supra*, Tr. 187-88.

[11] Rice, *supra*, Tr. 1443-44.

[12] Id., Tr. 1663-66.

[13] Peoples, U. S. Director of Procurement (C) Tr. 10009.

[14] Id., Tr. 10361-62.

to awards on ties which were made to the nearest bidder to avoid bulk cement shifting in transit.[15] Garity, Director of Purchases of TVA, testified to awards made by that Authority to nearby mills which were able to supply cement when needed and not on the basis of price.[16] Rothbard testified that the nearness of the mill so that it could give faster delivery and would require less warehousing was an advantage to the government.[17] During the depression the government canvassed mills having very little government business so as to spread the business as far as possible if no other basis existed for award. However, the Comptroller General ruled that such division in the case of tie bids would encourage identity and Rice testified that he would not divide awards unless no one mill could furnish the requirements.[18] Admiral Peoples, Director of Procurement, testified concerning an instance where an award was divided because of the large quantity involved.[19] Armstrong, Assistant Chief of Accounts of the Bureau of Prisons, testified concerning an instance in September 1935 where all but one bidder quoted identical destination cost figures and the purchasing agent decided to reject all bids by mills which had land grant rates available and to award by lot among the mills with commercial rates only for the purpose of preventing retention of land grant advantage.[20] (In this connection see Operation of Control Clause; Effect on Land Grant Benefits, Part IV D, *supra*, p. 846.)

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[15] (C) Tr. 274-75, 291, 292, 320-21.

[16] (C) Tr. 2638.

[17] Rothbard, Attorney, U. S. Bur. of Reclamation (C) Tr. 1166.

[18] Rice, Attorney, U. S. War Dept. (C) Tr. 1453, 1696-97.

[19] (C) Tr. 10268.
Com. Ex. 1404: Denver office mailing list for specifications.

[20] (C) Tr. 2365-70.
Com. Ex. 370 A: Abstract of bids.

5. Types of Invitations and Bids; Extent of f.o.b. Mill Bidding

a. Specimens of Government Requests

The following are typical examples of government requests for bids before and during the NRA Code Period, after the Code, and after the complaint herein:

TYPE 1: F.O.B DESTINATION:

"Cement, Portland, in cloth bags, U. S. Government, (Bureau of Standards) specifications $.....Per bbl. F.o.b. ARMY BASE, Norfolk, Virginia"

(Com. Ex. 1042 B) (U. S. Shipping Board)

TYPE 2: F.O.B. MILL AND/OR DESTINATION:

"for delivery at shipping point and/or Mesa, Arizona"

(Resp. Ex. 295 B) (Bureau of Reclamation)

TYPE 3. F.O.B. MILL OR DESTINATIONS:

	Approx.	Per Bbl.
"American Portland Cement, in canvas sacks (4 sacks of 94 pounds each to the barrel), in accordance with specifications attached, ...	60,000 Bbls.	$.....$..... F.o.b. cars, contractor's Mill."

— OR (Alternate Bid) —

	Approx.	Per Bbl.
"American Portland Cement in canvas sacks (4 sacks of 94 pounds each to the barrel), in accordance with specifications attached, ...	60,000 Bbls.	$.....$..... F.o.b. cars on U. S. Government Spur Track on C.&G. RR, Greenville, Miss."

(Com. Ex. 187 B) (War, Engineers)

TYPE 4: F.O.B. MILL:

"700,000 Sacks American Portland Cement as speci-

fied: f.o.b. cars at mill located at ..... on .....RR."

(Resp. Ex. 854 E) (War, Engineers)

TYPE 5: F.O.B. MILL AND DESTINATION:

"Cement, American Portland, to meet the requirement of U. S. Government Master Specifications as set forth in Bureau of Standards Circular No. 33, April 25, 1927, in 94-lb. paper sacks, as follows:

F.o.b. mill at .....
F.o.b. T. C. Ry. incline, at water's edge, Nashville, Tenn. ....."

(Resp. Ex. 2704 A) (War, Engineers)

During the pre-code period requests of the following type were also made:

"American Portland Cement, in canvas sacks (4 sacks of 95 lbs. each to the barrel). In accordance with specifications attached, f.o.b. cars U. S. Government Spur Track on C.&G. R.R., near Greenville, Mississippi.
Deductions which may be made if purchased f.o.b. mill located at .....on ..... Railroad $.....$....."

(Com. Ex. 182 G) (War, Engineers)

During the post-code period requests of the following types were also made:

"Bids are requested f.o.b. cars at the bidder's shipping point.

Alternate bids may be submitted f.o.b. Newkirk, New Mexico, as provided in the bidding schedule. However, shipments will be made from bidder's shipping point to Newkirk on Government bills of lading and the official land grant freight rate or commercial rate, whichever is lower, at the time of opening bids will be deducted from the price bid in order to obtain the invoice price." (Com. Ex. 170 B, Par. XI) (War, Engineers)

and

"Cement, Portland, in paper bags, Fed. Spec. SS-C-191a. Firm prices f.o.b. bidder's shipping point and f.o.b. Government destination are desired. Bids which are qualified by requiring the government to deduct or add freight charges for the purpose of computing the invoice price are not desired and will not be considered. Cement is to be furnished as needed and called for." (Com. Ex. 366 E) (War, Quartermaster)

and

"Cement, Portland, in paper sacks four 94 pound sacks per barrel, to be in strict accordance with Federal Specifications SS-C-158 and SS-C-191 viz:

F.O.B., Fort Leavenworth, Kansas,

ALTERNATE BID requested as follows:

F.O.B., plant, point of origin.

NOTE: Reference Item 2 is construed to mean that quotation is requested on a STRICTLY PLANT PRICE, the price that is LAID DOWN AT THE ORIGINATING POINT ONLY. It must be understood that no other bid will be considered. Government Bill of Lading to be furnished by the Quartermaster, at Fort Leavenworth, Kansas." (Com. Ex. 368 E) (War, Quartermaster)

After July 2, 1937, the date of the complaint herein, the requests of the Procurement Division, carried the provision that:

"Bids purporting to name a guaranteed delivered cost to the Government at destination, with the provision that cost at mill may be determined by de-

ducting from such delivered cost the lowest freight rate available to the Government, shipments to move under Government bills of lading, have been designated as irregular bids and will not be considered."

(Com. Ex. 1054 D, KK) (U. S. Treas., State Procurement Office)

and later on stated that:

"No bid will be considered unless based on a delivered price f.o.b. cars at the bidder's mill or mills."

(Com. Ex. 1341 Par. 22) (Bureau of Reclamation)

b. Predominance of F.O.B. Destination Invitations and Bids

The Commission, in its Answer to Respondents' Motion to Adduce, concedes that it "never disputed * * * and do not dispute * * * now" the "incontrovertible evidence that public purchasing agencies generally request that they be quoted delivered prices" (Answer, p. 3). Respondents have accepted this concession (Reply on Motion, par. 8, p. 6). Accordingly the evidence as to the predominance of f.o.b. destination requests by the United States and the details as to bids responsive to such requests are not digested herein.

The facts concerning the bidders' complete compliance with such requests, as shown in Chart IV-C (*supra*, p. 874), are as follows:

It appears from the invitations and abstracts of bids in evidence that in the periods before and during the NRA Code requests calling only for f.o.b. destination bids were made covering a total of 8,426,370 barrels of cement and the bidders complied fully.[1]

Invitation	Tabulation of Bids
1	Com. Ex. 768
Resp. Ex. 3688 E, F, J	" " 387 B
" " 3689 C)	" " 1190 B
" " 3690 C)	" " 1190 C.

[Continued on page 933]

In the periods after the Code and after the complaint herein, invitations and abstracts of bids in evidence called for f.o.b. destination bids covering totals of 153,054 barrels and 614 barrels, respectively. These too were complied with fully.[2]

c. Alternate Invitations (Bidder's Option): F.O.B. Mill or F.O.B. Destination, F.O.B. Mill and/or F.O.B. Destination.

Invitations for F.O.B. Mill and F.O.B. Destination

Alternate invitations calling for either or both f.o.b. mill and f.o.b. destination bids have been requested by the

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[Continued from page 932]

Invitation	Tabulation of Bids
Com. Ex. 378	Com. Ex. 1099 A
" " 2772	" " 2772
" " 1042 B-C	" " 1042
Resp. Ex. 762	" " 1099 B
" " 769	" " 386 G-H
Com. Ex. 380	" " 1099 C
Code Period	
Com. Ex. 381	" " 1099 D
Resp. Ex. 2918 P-S	" " 401
" " 816 C	" " 178 A-B
Com. Ex. 382	" " 1099 M

Invitation	Tabulation of Bids
	Com. Ex. 1082
[2] Com. Ex. 372 B	" " 372 A
Resp. Ex. 3689 C)	" " 314 i, W
" " 3690 C)	
" " 776	" " 1099 R
Com. Ex. 373 B	" " 373 A
" " 384	" " 1099 W
Resp. Ex. 1349 A	" " 277 FF
Com. Exs. 3212-3215	" " 3212-3215
Post Complaint	
Resp. Ex. 96;)	" " 2613-2616
Tr. 14190-92)	

government and bid upon by respondents in many instances prior to and since the NRA Code.[1]

Dawson, Vice President of Medusa, and Taylor, of the Reclamation Bureau, both testified that on such requests it was optional with the manufacturer to bid either f.o.b. mill or f.o.b. destination.[2]

Custer, of the Navy Department, testified that it was the general rule with his office to invite bids for delivery at a Navy Yard or station along with another bid f.o.b. some intermediate shipping point.[3]

Taylor, of the Bureau of Reclamation, said that since the NRA Code, his office has asked for alternate bids f.o.b. shipping point "and/or" f.o.b. destination and has received bids both ways and either way. He said further that alternate bids were requested because a bidder might wish to bid in both ways and it gives the Government the right to select either type.[4]

Executives of various respondents testified to instances in which they had made f.o.b. mill bids on these alternate invitations.[5]

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[1] Coogan, Vice President, Alpha (R). Tr. 24202-03.
Dawson, Vice President, Medusa (R) Tr. 40058-59, 40362.
Moore, R. W., Vice President, Dewey (R) Tr. 46989-90.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39858.
Horner, President, Kosmos (R) Tr. 36945-47.

[2] (R) Tr. 40370-72.
Taylor, Asst. Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 315.

[3] Custer, Senior Administration Ass't, Bur. of Supplies & Accounts, Navy Dept. (C) Tr. 21265.

[4] Taylor, Ass't Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1257-59, 243-44, 1245, 1282-83, 21590-96.

[5] Coogan, Vice President, Alpha (R) Tr. 24202-03.
Dawson, Vice President, Medusa (R) Tr. 40058-59, 40358-64.
Moore, R. W., Vice President, Dewey (R) Tr. 46989-90.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39858.
Horner, President, Kosmos (R) Tr. 36945-47.

The facts concerning the bidders' compliance on such requests, as shown in Chart IV-C (*supra*, p. 874), are as follows:

The invitations and abstracts of bids in evidence show that in the periods before and during the Code seventeen alternate requests were issued where the type of bid was optional with the bidder covering a total of 1,255,700 barrels. The bids received were in the following types and amounts.*

	Amounts		
f.o.b. mill and	265,700	barrels	(pre-Code)
f.o.b. destination*	304,000	"	(Code)
1 f.o.b. mill 5 destination cost with control clause to arrive at f.o.b. mill**	360,000	"	"

* Shown in Chart IV-C as compliance.

** Shown in Chart IV-C as disputed compliance.

Invitation	Tabulation of Bids
Resp. Ex. 856 A	Com. Ex. 773
" " 863 A	" " 185 A, 776
	" " 779
	" " 781
Com. Ex. 3103 C	" " 1098
	" " 784
" " 187 B	" " 187 A
Resp. Ex. 1073 F	" " 790
	" " 791
Com. Ex. 114	" " 114 A-B
" " 161 E	" " 162 A-C
" " 159 (39)	" " 159 (23)
	" " 111 F
Resp. Ex. 888 A	" " 792
" " 2995 P-Q	" " 793
	" " 794
" " 1082 L-P	" " 795

	Amounts
1 f.o.b. mill 1 f.o.b. destination 2 destination cost with control clause to arrive at f.o.b. mill**	16,000 barrels (Code)
Destination cost with control clause to arrive at f.o.b. mill**	10,000 " "

** Shown in Chart IV-C as disputed compliance.

The invitations and abstracts in evidence show that in the period after the Code, including after the complaint herein, alternate requests with the option in the manufacturer, were issued covering a total of 5,397,890 barrels. The bids received were in the following types and amounts.[7]

Invitation	Tabulation of Bids
[7] Com. Ex. 171 D	Com. Ex. 171 A-C
" " 117	" " 115 H
Resp. Ex. 295 B	" " 118 B
	" " 796
" " 2334 A	" " 1089
" " 939 A, C	" " 1087 A-B
" " 292 B	" " 135 B
" " 3001 A, C	" " 119 B
" " 1315 D	" " 1095
Com. Ex. 122 (par. 8)	" " 121 C
Post Complaint	
Com. Ex. 180 D	" " 180 A
	" " 123 D
Resp. Ex. 894 A	" " 157
Com. Ex. 124 (par. 8)	" " 124 A
" " 113	" " 112 D

[Continued on page 937]

	Amounts
f.o.b. destination*	588,190 (post-Code, *i.e.*, up to July 2/37
f.o.b. mill*	81,000 (" ") 204,000 (post-complaint)
1 f.o.b. mill 1 f.o.b. destination 1 destination cost with control clause to arrive at f.o.b. mill*	53,000 (post-Code)
f.o.b. mill and f.o.b. destination*	4,357,000 (post-complaint)
f.o.b. destination and destination cost with control clause to arrive at f.o.b. mill*	68,700 (" ")
Destination cost with control clause to arrive at f.o.b. mill**	46,000 (post-Code)

* Shown in Chart IV-C as compliance.
** Shown in Chart IV-C as disputed compliance.

[Continued from page 936]

Invitation	Tabulation of Bids
Resp. Ex. 297 B	Com. Ex. 3261 I
" " 340 A	" " 125 B
" " 296 A	Resp. Ex. 340 H
" " 273 A	" " 296 N
" " 344 A	" " 273 H
" " 297 B	" " 344 K
" " 350 A	" " 297 K
	" " 350 K
	Com. Ex. 120 B

Another type of invitation calling for bids both f.o.b. mill and f.o.b. destination was used.

Ashley, of the Department of Agriculture, said that the reasons why a procurement officer wants bids both f.o.b. mill and f.o.b. destination are to get the benefit of the "Government" freight rates when they are lower, to get "the broadest competition" and to give the "local field" an opportunity to bid.[8]

Requests of this type in the periods before and during the Code were negligible and the invitations in evidence cover a total of only 11,550 barrels.[9] Bids were received thereon as follows:

	Amounts	
f.o.b. mill and f.o.b. destination*	5,800 barrels	(pre-Code)
f.o.b destination***	3,150 "	(pre-Code)
f.o.b. destination and destination clause with control clause to arrive at f.o.b. mill**	2,600 "	(Code)

* Shown in Chart IV-C as compliance.
** Shown in Chart IV-C as disputed compliance.
*** Shown in Chart IV-C as non-compliance.

In the periods after the Code and after the complaint additional invitations in evidence calling for bids both f.o.b.

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[8] Ashley, Chief of the Division of Purchases, U. S. Dept. of Agriculture (C) Tr. 5463.

Invitation	Tabulation of Bids
[9]	Com. Ex. 387 A-J
	" " 774
	" " 775
Com. Ex. 380	" " 1099 C, D, M
Resp. Ex. 2704 A	" " 789

mill and f.o.b. destination cover a total of 538,823 barrels. Bids were received thereon as follows:[10]

f.o.b. destination and destination cost with control clause to arrive at f.o.b. mill**	35,957	(post-Code)
	251,666	(post-complaint)
1 f.o.b. destination, remainder destination cost with control clause to arrive at f.o.b. mill***	250,000	(post-Code)
f.o.b. mill and f.o.b. destination*	1,200	(" ")

* Shown in Chart IV-C as compliance.

** Shown in Chart IV-C as disputed compliance.

*** Shown in Chart IV-C as non-compliance.

10.

Invitation	Tabulation of Bids
Resp. Ex. 776	Com. Ex. 314 Q
" " 974 A	" " 1099 R
" " 960 A-B	" " 1096 A-C
" " 955 A, C	" " 1085 A-C
" " 950 A, C	" " 1088
" " 947 A, C	" " 1086
Com. Ex. 170 B	" " 1090
" " 338 F, H	" " 1092
Resp. Ex. 920 A	" " 170 A
" " 898 A, C	" " 338 D
" " 908 A, C	" " 1083
" " 3182 E	" " 1084 B
Com. Ex. 334 C, E	" " 1094
" " 339 C	" " 303 D
" " 337 D	" " 334 B-C
" " 336 J-L	" " 339 J
" " 335 E, H	" " 337 K
	" " 336 C-D
	" " 1091
	" " 335 C-D

[Continued on page 940]

d. F.o.b. Mill Invitations and Bids; Introduction and Statistics

Admiral Peoples, U. S. Director of Procurement, testified that "It is an administrative question as to whether bids are invited f.o.b. mill"[1] and that "Our general experience has been that in the non-land grant areas there was very little gained by f.o.b. mill bidding."[2] The evidence previously digested shows that the purpose of federal agencies in requesting f.o.b. mill bids is to take title at the mill in order to secure the benefit of land grant rates.[3]

The facts concerning the bidders compliance on such requests, as shown in Chart IV-C (*supra*, p. 874), are as follows:

Invitations and abstracts of bids in evidence show that in the period before the NRA Code f.o.b. mill bids only were requested on 15 lettings for a total of 1,792,500 barrels and were received for the entire quantity from the major-

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[Continued from page 939]

Invitation	Tabulation of Bids
	Com. Ex. 1093
Com. Ex. 368 E	" " 368 B
" " 384	" " 1099 W
" " 366 B	" " 366 B
" " 369	" " 369 B
Post Complaint	
Com. Ex. 176 C	" " 176 A
" " 1054 H	" " 1055
	" " 363 C

[1] (C) Tr. 10502.

[2] Id., Tr. 10008.

[3] Part IV C, *supra*, p. 813.

ity of bidders. Accordingly compliance with the requests is shown on Chart IV-C. A few bidders, on invitations for 368,000 of the 1,792,500 barrels, quoted f.o.b. destination prices and stated amounts to be deducted therefrom in order to arrive at f.o.b. mill prices. On other invitations calling for 500,000 of the 1,792,000 barrels a few bidders quoted f.o.b. destination only.[4]

Also in the Code period a number of invitations were issued calling for f.o.b. destination bids with the request that the bidder state the amount to be deducted from such bid in order to arrive at an f.o.b. mill price. These invitations called for a total of 365,200 barrels. Bids were received as requested on the entire quantity.[5]

In the Code period f.o.b. mill bids were requested on 6 lettings in evidence for a total of 3,265,800 barrels. Bids

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Invitation	Tabulation of Bids
[4]	Com. Ex. 769
Resp. Ex. 854 F	" " 772
	" " 771
	" " 1328
	" " 1329
" " 872 G	" " 1330
	" " 777 A
	" " 1331
" " 1060 A	" " 780
	" " 783
" " 2703 B	" " 785
	" " 786
	" " 129
" " 264 C	" " 788
	Resp. Ex. 264 H
Invitation	**Tabulation of Bids**
[5] Com. Ex. 182 G	Com. Ex. 182
	" " 765-767
Resp. Ex. 1059 A	" " 770
	" " 778
	" " 782
	" " 787

were received as requested for 1,855,000 barrels which are shown on Chart IV-C as compliance. On the remainder, which totaled 1,410,800 barrels, the bids were destination costs with use of the control clause to arrive at f.o.b. mill prices excepting that on 600,000 thereof a few bidders also bid f.o.b. mill.[6] The 1,410,800 barrels are shown in Chart IV-C as disputed compliance.

From the end of the Code period until the date of the complaint herein f.o.b. mill bids were requested on 5 lettings in evidence for a total of 1,224,000 barrels. With the exception of one f.o.b. mill bid on a letting for 305,000 barrels[7] and f.o.b. destination bids only on a letting for 1,000 barrels[8] all bids were destination costs with use of the control clause to arrive at f.o.b. mill prices.[9] 1,223,000 of the 1,224,000 barrels are shown on Chart IV-C as disputed compliance and the other 1,000 are shown as non-compliance.

In the period after the complaint f.o.b. mill bids were requested on 22 invitations, all by the Procurement Division, Treasury Department, for a total of 2,579,018 bar-

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[6]

Invitation	Tabulation of Bids
Com. Ex. 396 E	Com. Ex. 397
" " 134 E	" " 134 C
	" " 165
	" " 127 A-B
" " 167 A	" " 166
Resp. Ex. 2993 H	" " 193

[7] Com. Ex. 169 A.

[8] Com. Ex. 268 F.

[9]

Invitation	Tabulation of Bids
Com. Ex. 168 C	Com. Ex. 168 A
	" " 370
Resp. Ex. 759 C	" " 268 F
Com. Ex. 175 B	" " 175 A
" " 169 C	" " 169 A

rels.[10] Bids were received as requested on 20 of the invitations aggregating 2,544,018 barrels.[11] On the other 2 invitations for a total of 35,000 barrels for use in Ohio-West Virginia and New Jersey, no bids were received[12] and the 35,000 barrels are shown on Chart IV-C as non-compliance. The 2 invitations contained unusual features like the "Good Friday" invitation of April 15, 1938[13] which is not included in Chart IV-C because it involved an indefinite quantity. The evidence on these last 3 invitations is digested separately under Part IV. E entitled "Reasons for Not Bidding" (*infra*, pp. 956-57, 959-68).

i. *Pre NRA Code*

There is digested in this and the two following subdivisions the testimony of government officials and executives of cement companies concerning the overall extent of f.o.b. mill invitations and bids (i) in the pre-code period, (ii) in the period subsequent to the effective date of the Code, and (iii) in general.

Taylor, of the Bureau of Reclamation, testified with respect to a tabulation which he had made up from his own information of bids received from March 1927 to April 1933 representing the principal cement purchases in that period. He said that it listed 18 purchases in 15 of which bids were requested f.o.b. mill only, and that the bids

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	Invitation
[10]	Com. Ex. 1341 (Par. 22)
	" " 1381 (Par. 17)
	Resp. Ex. 370 B, E
	" " 371 B, E
	" " 372 D, G
	" " 373 C, H
	Tr. 10266-67
	Tr. 10272-75

[11] Resp. Exs. 370 A, 371 A, 372 A, B, 373 A, B, 384 A-C.

[12] Com. Exs. 1394, 1399.

[13] Com. Ex. 1339.

received were all f.o.b. mill in 14 cases.[14] He testified further that most invitations and most bids in the pre-code period were f.o.b. mill.[15]

Rice, of the War Department, testified that his department usually obtained f.o.b. mill prices.[16] The same witness identified what he described as "a representative group" of lettings by his department involving the "largest" quantities they had.[17] When cross-examined in connection with the lettings by his department, he testified that f.o.b. mill bids had been made as follows:

Date of Letting	Number of f.o.b. Mill Bids	
February 25, 1927	All 13 bidders	(Tr. 3508-09)[18]
November 18, 1927	A "number" of bidders	(Tr. 3512-13)[19]
August 20, 1928	10 out of 13 bidders	(Tr. 3515)
April 2, 1929	All 6 bidders	(Tr. 3515-17)
June 3, 1929	"Many" of 12 bidders	(Tr. 3517)
December 17, 1929	15 out of 16 bidders	(Tr. 3517-18)
February 18, 1930	2 out of 5 bidders	(Tr. 3518-19)
April 17, 1930	All 9 bidders	(Tr. 3518)
June 9, 1930	3 out of 8 bidders	(Tr. 3519)
June 20, 1930	6 out of 10 bidders	(Tr. 3522)
August 1, 1930	All 7 bidders	(Tr. 3522-23)

[14] Taylor, Ass't Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 242.

[15] Id., Tr. 21441, 21571, 1257-59, 241-42.

[16] Rice, Attorney, U. S. War Dept. (C) Tr. 3547.

[17] Id., Tr. 1752-53.

[18] Invitation here asked for a destination price with amount to be deducted to arrive at F.O.B mill price.

[19] Id.

Date of Letting	Number of f.o.b. Mill Bids	
October 28, 1930	All 11 bidders	(Tr. 3523)
February 4, 1931	5 out of 9 bidders	(Tr. 3523)
February 10, 1931	11 out of 12 bidders	(Tr. 3524)
June 26, 1931	All 9 bidders	(Tr. 3526-27)
October 13, 1931	5 out of 6 bidders	(Tr. 3527)
October 15, 1931	All 4 bidders	(Tr. 3527-28)
November 11, 1931	1 bidder	(Tr. 3528)
April 11, 1932	All 6 bidders	(Tr. 3528)[20]
June 14, 1932	All 6 bidders but not on all items	(Tr. 3530)
August 25, 1933	12 out of 13 bidders	(Tr. 3530)
September 20, 1933	10 bidders on 1 or more items	(Tr. 3530-31)
November 14, 1933	All 4 bidders	(Tr. 3531)

The same witness said that he "wouldn't dispute" that the following companies made f.o.b. mill bids in this period although he could not recall receipt of such bids from "all" of them:

Alpha	Kosmos	Medusa	Signal Mountain
Arkansas	Lehigh	Missouri	Trinity
Cumberland	Lone Star	National	Universal Atlas
Hermitage	Louisville	Penn-Dixie	Volunteer[21]

White, an FTC Examiner, also testified to the receipt of f.o.b. mill bids by the Navy at Pensacola.[22]

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[20] Invitation here asked for a destination price with amount to be deducted to arrive at f.o.b. mill price.

[21] (C) Tr. 21401-04.

[22] (C) Tr. 5950-52.

Executives of numerous respondents testified that they had bid mill prices to the government before the Code period.[28]

Respondents have moved to adduce, excluded evidence showing a large number of f.o.b. mill bids made by the following respondents to the Department of the Interior, Bureau of Indian Affairs, on various invitations in the period from May, 1929 up to the beginning of the NRA Code:

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[28] Alpha: Coogan, Vice President (R) Tr. 24197-99.

Consolidated: Storey, President (R) Tr. 47591-92, 47595, 47602-04.

Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39858, 39908, 39918-19.

Dewey: Moore, R. W., Vice President (R) Tr. 46988, 47003-04.

Florida: Storey, Vice President (R) Tr. 47591-92, 47595, 47602-04.

Hermitage: McGovern, Sales Manager (R) Tr. 36318-19, 36293-94.

Huron: Rooney, Vice President (R) Tr. 33689-90.

Lehigh: Bowen, Vice President (R) Tr. 27099-104.

Lone Star: Koch, Vice President (R) Tr. 32671, 32717-18, 33224-26.

Com. Exs. 1112: Lone Star Pamphlet "Trade Ethics and Marketing", 1129 H: Inter-office memo 4/8/33.

Neylan, Assistant General Sales Manager (C) Tr. 6103-06, 6446-47.

Marquette: Colburn, Vice President (R) Tr. 39978, 39034-35.

National: Dannelly, Vice President (R) Tr. 39652-54.

Oklahoma: Thompson, Sales Manager (R) Tr. 46525.

Penn-Dixie: Browder, Traffic Manager (R) Tr. 38441, 38501-03.

Signal Mountain: Storey, Vice President (R) Tr. 47591-92, 47595, 47602-04.

Trinity: Storey, Vice President (R) Tr. 47591-92, 47595, 47602-04.

Alpha	Northwestern States
Dewey	Oklahoma
Lehigh	Penn-Dixie
Lone Star	Signal Mountain
Medusa	Universal Atlas[24]
Missouri	

At the time this evidence was offered counsel for respondents expressly stated that if contained "f.o.b. mill bids without any reference to control clauses, equalization clauses, or destination costs."[25]

ii. *Code Period and After Including Post Complaint*

Taylor, of the Bureau of Reclamation, testified that his office has received f.o.b. mill bids from some companies every year for the last ten years.[26] He said further that the prevailing type of bids after the Code was f.o.b. destination, but by this he did not intend to infer that any particular company refused to bid f.o.b. mill.[27]

Rice, of the War Department, testified that they had received some f.o.b. mill bids during the Code period but that from early 1935 until December 1937 awards were made only on an f.o.b. destination basis because f.o.b. mill prices were not being received.[28] He referred to one letting

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[24] Resp. Ex. 3660 Z12-Z14, Z16, Z18-Z23 for id.; (R) Tr. 47688-701, 47704 (Motion to Adduce, Subj. II, p. 27).

[25] Tr. 47688.

[26] Taylor, Ass't Chief of Eng. Div., U. S. Bur. of Reclamation (C) Tr. 1257.

[27] Id., Tr. 243, 21591.

[28] Rice, Attorney, U. S. War Dept. (C) Tr. 21354, 3532-33, 3535, 1757-59.

in June 1936 where one of the bidders bid f.o.b. mill,[29] and to another on April 3, 1934 where all twelve bidders bid f.o.b. mill.[30]

Custer, of the Navy, testified that f.o.b. mill bids to his department were exceptional for many years.[31] It is important to note that the same witness testified that Pensacola was the only Navy Yard to which land grant rates were available,[32] and he testified further that a series of invitations [Com. Exs. 378-382] which were introduced in evidence by the Commission, none of which called for f.o.b. mill bids, but all for f.o.b. destination bids, were "a fair cross section of the bids" over the period from 1931 to 1936.[33]

Fry, of the Department of the Interior, could not remember getting any bids on what counsel for the Commission called a "straight" f.o.b. mill basis since the Code started.[34]

Executives of some 19 respondents testified that they had made f.o.b. mill bids to the government since the beginning of the Code period.[35]

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[29] Rice, Attorney, U. S. War Dept. (C) Tr. 1531-32, 1701, 1705.

[30] Id., Tr. 3532.

[31] Custer, Senior Administration Assistant, Bureau of Supplies & Accounts, Navy Dept. (C) Tr. 2532, 21255-56.

[32] Id., Tr. 21261-63.

[33] (C) Tr. 21285.

[34] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 132.

[35] Alpha: Coogan, Vice President (R) Tr. 24202-08.
Arkansas: Thompson, Sales Manager (R) Tr. 46533, 46525-29.
Consolidated: Storey, President (R) Tr. 47591-92.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39859, 39919-20.
Florida: Storey, Vice President (R) Tr. 47591-92.
Hawkeye: Manley, General Manager (R) Tr. 41933.
Hermitage: McGovern, Sales Manager (R) Tr. 36318-20, 36353-58.
Huron: Meyers, Traffic Manager (R) Tr. 33317-18.
Rooney, Vice President (R) Tr. 33671-72.

Dawson, Vice President of Medusa, testified concerning an f.o.b. mill bid made by his company on June 1, 1939 to the Department of Agriculture,[36] but evidence offered by the same witness was excluded as to other post-complaint f.o.b. mill bids which he had made to the Quartermaster's Corps, the Soil Conservation Service, the Departments of Agriculture and of the Interior, and to other departments in the post-complaint period.[37] This excluded evidence and excluded evidence showing numerous f.o.b. mill bids to the same and other government departments by many other respondents (see list in footnote 38), in the periods during and after the code as well as after the complaint, is sought to be adduced herein. (Motion, Subject II, Par. 30, Subject XIII(i)). At the time this evidence was offered respondents' counsel stated that it consisted of "what have been referred to as flat f.o.b. mill bids", having no reference to control or equalization clauses.[38]

Kosmos: Horner, President (R) Tr. 36932, 36942-47.
Lawrence: Ackerman, Vice President (R) Tr. 31289-93.
Lehigh: Bowen, Vice President (R) Tr. 27095-97, 27101-04.
Medusa: Dawson, Vice President (R) Tr. 40358-64, 40399-400.
Oklahoma: Thompson, Sales Manager (R) Tr. 46533, 46525-29.
Petoskey: Lucas, Vice President (R) Tr. 38801-02.
Signal Mountain: Storey, Vice President (R) Tr. 47591-92.
Southern States: Elcock, Vice President (R) Tr. 37579.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 39012-15.
Trinity: Storey, Vice President (R) Tr. 47591-92.
Volunteer: Lewis, Manager (R) Tr. 33002.

[36] (R) Tr. 40272.

[37] (R) Tr. 40275-76; Resp. Exs. for Id. 3165, 3170-3173, 3174 A, B, L-Z3, 3175-76; Offer of Proof Tr. 40282-83.

[38] Resp. Exs. for Id. 3659 P-W, Y, Z13-Z16, Z20, Z39-Z40, Z43-Z46, Z51-Z52, Z54, Z56-Z58, Z65-Z66, Z71-Z74; (R) Tr. 47679, 47688. Offer of Proof Tr. 47684, 47687.
List of Bidders: Alpha, Colorado, Hermitage, Idaho, Kosmos, Lehigh, Lone Star, Marquette, Monarch, National, Penn-Dixie, Southwestern, Superior (Ohio), Three Forks, Union, Universal Atlas, Volunteer.

iii. *General*

Invitations calling for f.o.b. mill bids were relatively few prior to the Code period and have occurred mainly since the complaint herein.[39] Elcock, Vice President of Southern States, testified that he knew of only one such invitation prior to the "Good Friday" letting of April 15, 1938.[40] Sweeney, Vice President of Edison, testified that he had received no request for an f.o.b. mill bid from the government prior to the same letting.[41] Browder, Traffic Manager of Penn-Dixie, testified that prior to the Procurement Division's invitations in 1938 the government generally did not ask for f.o.b. mill bids where land grant rates were not involved and he could not recall any instance where this had occurred.[42] Letzkus, Sales Manager of Pittsburgh, testified that his company was requested to bid f.o.b. mill on two occasions.[43] Nelson, Vice President of Wolverine, testified that his company had received f.o.b. mill requests only recently.[44]

Meyers, Traffic Manager of Huron, testified to one instance in 1939 where the Procurement Division lost money by buying f.o.b. mill from Huron in Detroit on W.P.A. work for locations nearer to its Saginaw plant. The Procurement Division paid $1.66 per barrel at Detroit plus 57

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[39] Dewey: Moore, R. W., Vice President (R) Tr. 43799-400.
Hermitage: McGovern, Sales Manager (R) Tr. 36351-52.
Medusa: Dawson, Vice President (R) Tr. 40058-59.
Southern States: Elcock, Vice President (R) Tr. 37577.

[40] Com. Ex. 1339: Procurement Division Invitation and Mailing List.
Elcock, Vice President, Southern States (R) Tr. 37577, 37645.

[41] (R) Tr. 35640, 35795.

[42] (R) Tr. 38433-34.

[43] (R) Tr. 37889.

[44] (R) Tr. 36068-69.

cents per barrel for freight, whereas it would have paid less on the basis of the price of $1.79 a barrel at Alpena.[45]

There was testimony by executives of several respondents that they had made f.o.b. mill bids although they did not specify the exact period.[46] One of these witnesses also testified that he had bid a delivered price to the government stating the amount which the government could deduct for commercial freight in order to arrive at an f.o.b. mill price.[47]

Officials of various federal departments testified generally to "difficulty" and lack of "success" in their efforts to secure f.o.b. mill bids.[48] Rice, of the War Department, conceded on cross-examination that an abstract of bids to the U. S. Engineers on October 1, 1937, which was introduced in evidence by Commission's counsel, stated on its face[49] that the award was made to "the lowest bidder as to price f.o.b. cars at contractor's shipping point" and "on an f.o.b. shipping point basis." He argued in his testimony that he did not consider this an f.o.b. shipping point bid because it was arrived at by "a process of sub-

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[45] Meyers, Traffic Manager, Huron (R) Tr. 33368-73.
Rothbard, Attorney, U. S. Bur. of Reclamation (C) Tr. 1122.

[46] Lucas, Vice President, Petoskey (R) Tr. 38764.
Moore, R. W., Vice President, Dewey (R) Tr. 46988.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39088.

[47] Blair, W. R., *supra*, Tr. 39012.

[48] Holmes, W., Legal Advisor, Proc. Division, War Dept. (C) Tr. 21085-86.
Rothbard, *supra*, Tr. 1122.
Peoples, U. S. Director of Procurement (C) Tr. 10507-08.
McNair, State Procurement Officer, Mississippi (C) Tr. 4994.
Feldman, Supervisor of Procurement Procedure, Quartermaster's Corps, War Dept. (C) Tr. 21173.
Armstrong, Assistant Chief of Accounts, U. S. Bur. of Prisons (C) Tr. 2363.

[49] Com. Ex. 157.

traction" from the bidder's destination cost price. He said that he was able to make the award f.o.b. shipping point because "the specifications provided that for the purpose of an award land grant rates would be subtracted from these prices."[50] Holmes, also of the War Department, said there was no difficulty in getting "secret" f.o.b. mill bids.[51] Peoples, Director of Procurement, said that the sellers were dictating to the government as to how they should sell instead of letting the government dictate to them.[52] The same witness testified that he had found in many cases he could secure lower prices on f.o.b. mill invitations than when requesting f.o.b. destination.[53] Hayghe, Chief of Traffic of the Procurement Division, testified that in the sixty days before he took the stand as a witness the State Procurement Office in Alabama had made a special effort, but unsuccessfully, to get f.o.b. mill bids by inserting a clause making the bidders' control clause improper.[54] Fry, Purchasing Officer of the United States Department of Interior, testified that his office was able to obtain bids f.o.b. shipping point on other items than cement and that some of those bidders gave f.o.b. factory prices, others named delivery points and some named points where they had warehouses.[55]

6. Non-Agreement and Non-Resistance to f.o.b. Mill Bidding; Policies Thereon

Executives of many respondents testified, in substance, that they had no understanding or agreement with competitors to refrain from f.o.b. mill bids, that they had no

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[50] Rice, Attorney, U. S. War Dept. (C) Tr. 1745-48.

[51] Holmes, W., Legal Advisor, Proc. Division, War Dept. (C) Tr. 2339-40.

[52] (C) Tr. 10503-07.

[53] Id., Tr. 10005-08.

[54] (C) Tr. 4860-64.

[55] (C) Tr. 190.

policy against such bids and that they had never refused to make them.[1] The executives of several respondents testified that it was their policy to quote f.o.b. mill prices to the government when requested[2] or that their policy was flexible and that they sometimes made such bids and on other occasions did not.[3] One executive testified that his company never bid f.o.b. mill on alternate invitations because it did not feel that the market was at the mill and wanted to be competitive at the point of use.[4] Another executive testified that his company would refuse to bid f.o.b. mill to the government on invitations in localities where it is represented by dealers, in order to protect the

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[1] Dewey: Moore, R. W., Vice President (R) Tr. 46988, 47035.
Edison: Sweeney, Vice President (R) Tr. 35798.
Glens Falls: Titsworth, President (R) Tr. 47912.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29525.
Hawkeye: Manley, General Manager (R) Tr. 41714.
Hermitage: McGovern, Sales Manager (R) Tr. 36334-35, 36354-58.
Kosmos: Horner, President (R) Tr. 36813.
Marquette: Colburn, Vice President (R) Tr. 39035-36.
Medusa: Dawson, Vice President (R) Tr. 40058-59, 40610.
Nebraska: Hoenig, Sales Manager (R) Tr. 42055.
Oklahoma & Arkansas: Thompson, Sales Manager (R) Tr. 46536.
Petoskey: Lucas, Vice President (R) Tr. 38748-49, 38801-02, 38809-10.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37700-01.
Southern States: Elcock, Vice President (R) Tr. 37597, 37606.
Superior: Davis, President (R) Tr. 29597-98.

[2] Dewey: Moore, R. W., *supra*, Tr. 47003-04.
Marquette: Colburn, *supra*, Tr. 39978-79.
National: Dannelly, Vice President (R) Tr. 39627-28.
Petoskey: Lucas, *supra*, Tr. 38809-10.

[3] Dawson, *supra*, Tr. 40358-64, 40370, 40408-09.

[4] Robeson, Vice President, Nazareth (R) Tr. 28048.

dealers because they handle the bulk of the business.[5] Some executives testified that they had a policy against f.o.b. mill bidding. One of these was Bates, Sales Manager of Federal, who said that his policy was not due to any loyalty to members of the industry but because he was convinced that delivered prices were the proper way to sell and because if he were to bid f.o.b. mill to the government he would have to quote in the same way to every other customer. He said that would deprive his company of the good will of dealers who might lose their protection. Furthermore, he did not see why an exception should be made in favor of the government.[6] Likewise, Warren, Vice President of Southwestern [Osborn], testified that he did not make f.o.b. mill bids because he was trying to meet the market at the point of use and many customers were opposed to such sales.[7] Ackerman, Sales Manager and Vice President of Lawrence, testified that his company does not quote f.o.b. mill prices except to the railroads. He said that this was because the company's business was not at the mill and that it had had a delivered price policy since he became connected with it. He testified to one exception in which an f.o.b. mill bid was made to the government on the Passamaquoddy Dam Project.[8] F. B. Warren, Vice President of Bessemer, testified that he does not believe in selling f.o.b. mill and feels that it denies him his privilege to compete by bidding at the point of use, which is the way in which he can compete most effectively. MacIntyre, of counsel to the Commission, testified that in May, 1933 Blaine Smith, formerly President of Penn-Dixie, told him it was that company's policy not to quote the federal gov-

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[5] Dawson, Vice President, Medusa (R) Tr. 40367-69.

[6] (R) Tr. 30836-38, 30535-36.

[7] (R) Tr. 29311-12.

[8] (R) Tr. 31191-93.

[9] (R) Tr. 32126-27, 32148-49, 32557-61.

ernment or anyone else f.o.b. mill prices because such bids did not give certainty as to delivered cost at a particular time as did f.o.b. destination prices.[10]

In f.o.b. mill bidding, as in other types of bidding, manufacturers want to know the destination or point of use so that they can quote prices which will be low as their competitors and because the government makes awards on the basis of the cost at destination.[11] Ackerman, of Lawrence, testified that confusion would result if he could not tell a customer his price at a given destination.[12] Executives of many respondents testified that the destination was always made known on invitations by the government until the last few years and that they never quoted f.o.b. mill prices unless they knew the point of use.[13] An executive of Huron testified that his company made f.o.b. mill bids without regard to the destination.[14] Russell, Vice President of Peerless, testified that he had no objection to selling f.o.b. mill to the government if it was a definite quantity to be delivered at a particular time.[15]

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[10] MacIntyre, Attorney, F.T.C. (C) Tr. 14769-71.

[11] McGovern, Sales Manager, Hermitage (R) Tr. 36358-59.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6679.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38501-03.
Brooke, Vice President, Monarch (R) Tr. 42410.

[12] Ackerman, Vice President, Lawrence (C) Tr. 7287.

[13] Bessemer: Warren, F. B., Vice President (R) Tr. 32169.
Dewey: Moore, R. W., Vice President (R) Tr. 47327-28.
Lehigh: Bowen, Vice President (R) Tr. 27086-87.
Lone Star: Koch, Vice President (R) Tr. 33224-26, 32671-72.
Marquette: Colburn, Vice President (R) Tr. 40003.
Peerless: Russell, Vice President (R) Tr. 34489.
Penn-Dixie: Wing, Vice President (C) Tr. 8173-74.
Whitehall: Elliott, Vice President (R) Tr. 28653-54.

[14] Rooney, Vice President, Huron (R) Tr. 33688-90.

[15] Russell, *supra*, Tr. 34236-37.

There was testimony by executives of several respondents that they never had requests for f.o.b. mill prices from dealers or other commercial customers and that the only such requests were by the United States and, in 1933, by the State of Illinois.[16]

7. Reasons For Not Bidding

Out of all the lettings concerning which evidence was introduced in this case there were four invitations to bid, each issued by the Procurement Division of the Treasury, on which many, but not all, respondents refrained from bidding. In chronological order these invitations were as follows:

1. Invitation for 1620 barrels of cement issued by the Mississippi State Procurement Office for W.P.A. work at Rolling Forks, Mississippi, to be opened on October 31, 1935.[1]

2. The "Good Friday" invitation to be opened on April 15, 1938.[2]

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[16] Bessemer: Warren, F. B., Vice President (R) Tr. 32169.
Federal: Bates, J. E., Sales Manager (R) Tr. 30535-36.
Marquette: Colburn, Vice President (R) Tr. 39957, 39965-66.
Medusa: Dawson, Vice President (R) Tr. 40059.
Monarch: Brooke, Vice President (R) Tr. 42276.
Nazareth: Robeson, Vice President (R) Tr. 28048.
Southwestern: Warren, G. E., Vice President (R) Tr. 28951.
In this connection, however, see Part IV A, Sealed Bids to States, relative to requests by Indiana and Illinois Highway Commissions for f.o.b. mill prices for trucking.

[1] McNair, State Procurement Officer, Mississippi (C) Tr. 4970-73, Com. Ex. 1063.

[2] Com. Ex. 1339-40.
The appellation "Good Friday" has been applied throughout the record because the opening date fell on Good Friday of 1938.

3 and 4. Invitations to be opened on May 18, 1938 which called for 29,500 barrels of cement, including 24,000 barrels of special cements, for use in Ohio and West Virginia[3] and for 5,500 barrels for use in New Jersey.[4]

Respondents moved to strike from the record the "Good Friday" invitation and numerous other post-complaint exhibits of the Commission, including the invitations for Ohio—West Virginia and New Jersey. The motion was denied, although the Trial Examiner had ruled early in the case that he would not receive further testimony on post-complaint transactions and had said that he would entertain a motion to strike any such evidence.[5]

Respondents have moved to adduce evidence on a variety of post-complaint matters on which the Commission was permitted to introduce evidence and they were not. (Motion to Adduce, Subj. XIII, p. 45, *et seq.*).

In addition to the four invitations specified above, particular respondents from time to time refrained from bidding on specific invitations although other respondents did bid upon them.

The evidence digested below covers each of the four specified invitations of the Procurement Division separately and is then followed by evidence relative to miscellaneous invitations on which particular respondents refrained from bidding.

a. Rolling Forks, Mississippi

Although this invitation called for only 1,620 barrels of cement the Mississippi State Procurement Officer testified that it was issued "to all cement dealers and manufacturers" as a "test" case because the Procurement Divi-

[3] Com. Exs. 1391, 1394.

[4] Com. Exs. 1395, 1399.

[5] Tr. 28889, 28947.

sion "wanted to see what we could get." He said further that it called for prices "both ways—point of origin and delivered".[1]

The mailing list shows that the invitation was sent to over 107 dealers and manufacturers in every section of the country.[2] Only four bids were received.[3]

Typical of the reasons stated by executives of different respondents why they did not bid was the testimony of Hoenig, Sales Manager of Nebraska, that the destination was so far distant that he knew the freight would absorb more than the price and the government would "laugh" at his bid.[4]

Executives of numerous respondents testified to their reasons for not bidding. These were principally that the destination was too far away and outside of the territory within which they ordinarily shipped.[5] Several said that they had never sold cement in Mississippi and that the destination was so far away and the freight rates so high that they could not bid a competitive price or make a

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[1] McNair, State Procurement Officer, Mississippi (C) Tr. 4970-73.

[2] Com. Ex. 1063.

[3] McNair, *supra*, Tr. 4970-73.

[4] (R) Tr. 42162-64.

[5] Warren, G. E., Vice President, Southwestern (R) Tr. 29281-82.
Ackerman, Vice President, Lawrence (R) Tr. 31167-68.
Porter, President, North American (R) Tr. 34127-30.
MacDonald, Vice President, Northwestern States (R) Tr. 36668-69.
Calvin, President, Aetna (R) Tr. 30017, 30265-66, 30269-71.
Dawson, Vice President, Medusa (R) Tr. 40084, 40404-05, 40408-09.
Brooke, Vice President, Monarch (R) Tr. 42281-86.
Horner, President, Kosmos (R) Tr. 36850-51.

profit.[6] Porter, President of North American, testified that his company did not refrain from bidding because the invitation called for an f.o.b. mill price.[7] MacDonald, Vice-President of Northwestern States, testified that he had no idea of what the price situation was in Rolling Forks or of any mill price which his company could have made which would have been competitive. Consequently he thought the invitation was a waste of time.[8] Dawson, Vice President of Medusa, testified that it was so far away that he did not know whether it called for an f.o.b. mill bid or an f.o.b. destination bid and was not interested.[9] Alexander, President of Missouri, testified that the type of business for which the invitation was issued was that on which his company normally sold to dealers.[10]

b. "Good Friday"

Admiral Peoples, U. S. Director of Procurement, testified that he originated the idea of this invitation and worked up the conditions for which it provided.[1] The invitation was issued to every manufacturer and mill in the

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[6] Porter, President of North American (R) Tr. 33906-07.
Bates, J. E., Sales Manager, Federal (R) Tr. 35212-18.
Calvin, President, Aetna (R) Tr. 30017, 30265-66, 30269-71, 30309-10.
Hoenig, Sales Manager, Nebraska (R) Tr. 41981-82.
Lucas, Vice President, Petoskey (R) Tr. 38779.
Scott, President, Keystone (R) Tr. 27442-43.

[7] Porter, *supra*, Tr. 34127-30.

[8] (R) Tr. 36668-69.

[9] (R) Tr. 40084, 40404-05, 40408-09.

[10] (R) Tr. 37267-68.

[1] (C) Tr. 10001.

United States and 109 names appear on the mailing list.[2] The invitation constituted a change in the methods of the Procurement Division and was designed to cover the cement needs of the government throughout the country for a period of four months from May 1 to August 31, 1938.[3] It called for bidding by zones and advertised for 63 such zones.[4] The Admiral testified that his idea and the selection of mills originated in his effort to get a change from identical bidding and to obtain competition.[5]

The invitation contained the following indefinite provisions with respect to the quantity of cement to be purchased:

> "2. Cement will be ordered from time to time in such quantities as may be needed. As it is impossible to determine the precise quantities of different kinds of cement * * * that will be required during the contract term, each bidder whose bid is accepted will be obligated to deliver all cement of the kind contracted for, that may be ordered from him during the contract term.
>
> The Procurement Division will not undertake to furnish bidders an estimate of the quantity to be purchased from successful bidders during the 4-month contract period. However, experience of Federal agencies for a comparable period indicates an approximate consumption of 3,000,000 barrels."[6]

Admiral Peoples conceded the following facts with respect to the invitation:

> The quantities called for were indefinite and the bidder would be bound to furnish an indefinite quantity.[7]

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[2] Peoples, U. S. Director of Procurement (C) Tr. 9993-94, 9998.

[3] Id., Tr. 9993-94, 10392-93.

[4] Id., Tr. 10049-50, 10054.

[5] Id., Tr. 9998-99.

[6] Com. Ex. 1339, at p. 6.

[7] Peoples, *supra*, Tr. 10349.

No one knew where the cement was to be used.[8]

The government "couldn't tell" what it was going to do unless it received bids in every zone and unless it knew where it was "going to use the cement."[9]

While the successful bidder in a particular zone could be compelled by the government to perform its contract such bidder could not compel the Government to perform on its part if a bidder in another zone produced a lower laid-down cost at destination.[10] The government would be "bound" to take all cement in a successful bidder's zone but if a lower price there was produced in an adjoining zone the General Accounting Office would not pass the voucher and the Procurement Division would feel obligated under the statute (R.S. §3709) to award on the basis of the lowest laid-down cost.[11]

In determining the question of "reasonableness of price" the government meant the mill price plus freight rates although the invitation called for bids f.o.b. mill.[12]

The following sixteen manufacturers, including four non-respondents and a few West Coast companies, made bids which complied in all respects with the invitation:

Allentown*	Louisville*	Olympic
Blue Diamond*	Monolith	Petoskey
Cowell*	Monolith Midwest	Southwestern
Edison	Northwestern Portland	Spokane
Huron	Northwestern States	Superior Portland[13]
Kosmos		

* non-respondent

[8] Peoples, U. S. Director of Procurement (C) Tr. 10403-04.

[9] Id., Tr. 10495.

[10] Id., Tr. 10361-62, 10370.

[11] Id., Tr. 10350-52, 10360-62.

[12] Id., Tr. 10054-56, 9993-94.

[13] Id., Tr. 10025.

In addition the following eight respondents, including four West Coast companies, submitted qualified bids which the government considered inacceptable:[14]

Aetna	Pacific
Calaveras	Riverside
California	Southern States
Marquette	Southwestern (El Paso)

Marquette's qualified bid proposed to take a definite minimum amount, but the Procurement Division considered that unsatisfactory.[15]

Some ten respondents wrote to the Procurement Division explaining in detail their reasons for not bidding.[16]

Admiral Peoples testified that the invitation was a failure because the bids did not adequately cover the country, favorable prices having been recieved in but 37 of the 63 zones, with the result that no contract was awarded and all bids were rejected.[17] He said that thereafter the Secretary of the Treasury determined that the only thing to do was to ask for a definite quantity and that in this manner each party would know what it was obligated to deliver.[18]

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[14] Peoples, U. S. Director of Procurement (C) Tr. 10026, 10038.

[15] Id., Tr. 10420.
Resp. Ex. 37—Lone Star.
Resp. Ex. 38—Lehigh.
Resp. Ex. 39—Ash Grove.
Resp. Ex. 40—Nazareth.
Resp. Ex. 41—North American.
Resp. Ex. 42—Universal Atlas.
Resp. Ex. 46—Hercules.
Resp. Ex. 2080—Federal.
Resp. Ex. 2198 A—Volunteer.

[16] Resp. Ex. 36—West Penn.

[17] Peoples, *supra*, Tr. 10041-42, 10048, 10054.

[18] Id., Tr. 10444-45.

He said also that the principal objection raised by some of the cement manufacturers was as to the indefiniteness of quantity and the absence of assurance that the government would purchase from a bidder.[19]

The following excerpts from some of the letters written by different respondents to the Procurement Division show that there were other objections, equally serious, relating to detriments to their businesses and harm to their normal customers, which were raised for the expressed purpose of cooperating with the government:

> WEST PENN said that the "effect will be bankruptcy of many companies particularly those having only one mill."[20]
>
> LONE STAR expressed its desire "to cooperate" but stressed the "indefiniteness" of the proposal as to quantity which might cause it to lose "a great many of our most valuable customers."[21]
>
> LEHIGH said that it would "gladly quote such business f.o.b. mill" if "in the opinion of purchasing agencies" it would secure any freight advantages to the government but stressed the indefiniteness of quantity "without the slightest assurance" with respect to the amount which it would be called upon to ship. This it said would tie up plant facilities "to a point where a manufacturer would have to forego all private business" and said further that the condition requiring the successful bidder to supply cement direct "would completely eliminate the cement dealer and thereby destroy the normal channels of distribution."[22]
>
> NAZARETH said that it had only one mill which was located in an area of large cement production and that the effect would be to "limit us to business

[19] Peoples, U. S. Director of Procurement (C) Tr. 10485-86.

[20] Resp. Ex. 36.

[21] Resp. Ex. 37.

[22] Resp. Ex. 38.

within the territory from which we have never secured more than a small part of our annual business." It said further that the method employed would "cause unemployment" and that its continued use might "set up virtual monopolies for some companies and * * * favor * * * so-called chain companies with their spread of plants."[23]

NORTH AMERICAN, among other things, suggested a conference between itself as a manufacturer and the Procurement Division under the auspices of the Federal Trade Commission to "reconcile the differences between these proposals and our proposals as a manufacturer" while looking toward a solution satisfactory to both parties.[24]

There was considerable testimony and other evidence by executives of different respondents as to their reasons for refraining from bidding on the invitation. These may be summarized as follows:

The invitation called for an indefinite quantity and while it was binding on the party to supply, it was not binding on the government to take.[25]

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[23] Resp. Ex. 40.

[24] Resp. Ex. 41.

[25] Coogan, Vice President, Alpha (R) Tr. 24182.
Elliott, Vice President, Whitehall (R) Tr. 28635.
Brobston, President, Hercules (C) Tr. 10590, 10593-94.
Scott, President, Keystone (R) Tr. 27578-82, 27609.
McKee, Vice President, West Penn (R) Tr. 27746.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 29411.
Ackerman, Vice President, Lawrence (R) Tr. 31192-93.
Lewis, Manager, Volunteer (R) Tr. 32989, 32991-97.
Porter, President, North American (R) Tr. 34093-96, 34124-25.
Russell, Vice President, Peerless (R) Tr. 34231, 34237-38.
Nelson, Vice President, Wolverine (R) Tr. 35980-81.
McGovern, Sales Manager, Hermitage (R) Tr. 36287.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37895.
Dawson, Vice President, Medusa (R) Tr. 40085, 40380.
Resp. Ex. 2198 A: Letter, 4/12/38, Volunteer to Procurement.
Resp. Ex. 37: Letter, 4/13/38, Lone Star to Procurement.

The provision in the invitation for bidding in the zone in which the manufacturer was located was discriminatory against single mill companies and restricted their selling territory.[26]

While a bidder was permitted to specify the maximum quantity and monthly delivery, such contracts had in the past been entered into on the basis of the requirements of particular types of customers and on the basis of previous experience as to such customers' requirements and shipments.[27]

It was improper to award on the basis of mill prices plus freight while requiring bids of f.o.b. mill prices only.[28]

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[26] Resp. Ex. 46: Letter 4/14/38, Hercules to Procurement.
Scott, President, Keystone (R) Tr. 27580, 27620-21.
Resp. Ex. 1417: Map of Keystone's marketing area.
McKee, Vice President, West Penn (R) Tr. 27746-47.
Resp. Ex. 36: Letter, 4/14/38, West Penn to Procurement.
Robeson, Vice President, Nazareth (R) Tr. 28053.
Resp. Ex. 40: Letter, 4/14/38, Nazareth to Procurement.
Warren, Vice President, Southwestern (R) Tr. 28956.
Bates, Sales Manager, Federal (R) Tr. 30536-44, 30807-09, 30860.
Resp. Ex. 2080: Letter, 4/14/38, Federal to Procurement.
Resp. Ex. 2081: Map of New York showing Zones 1b, 2a, 2b. Federal could only bid in Zone 2b.
Nelson, Vice President, Wolverine (R) Tr. 36058.
McGovern, Sales Manager, Hermitage (R) Tr. 36363-64.

[27] Coogan, Vice President, Alpha (R) Tr. 24373-79.
Scott, *supra*, Tr. 27621-23.
Lewis, Manager, Volunteer (R) Tr. 32993-96.
Porter, President, North American (R) Tr. 34093-94, 34123-25.
Nelson, supra, Tr. 36057-58.
McGovern, *supra*, Tr. 36288; Resp. Exs. 2701 A-B, 2702 A-C: Letters, 1929 and 1933 from Hermitage to dealers refusing to enter into blanket contracts.
Dannelly, Vice President, National (R) Tr. 39649-51.
Dawson, Vice President, Medusa (R) Tr. 40378-81.

[28] Coogan, *supra*, Tr. 24181-82.
Ackerman, Vice President, Lawrence (R) Tr. 31192.
Warren, Vice President, Bessemer (R) Tr. 32156-57, 32159.

The provision requiring successful bidders to furnish cement not only to government agencies at the point of use, but, in addition, to any and all people and agencies using cement on, or supplying cement to projects financed with federal funds was contrary to the normal procedure of manufacturers to sell for various types of work through dealers and harmful to this important class of customers.[29]

The provision that bidders should be prepared to submit bins for tests within 15 days after receipt of an order required them to manufacture without assurance as to when cement would be ordered out and thus interfered with storage facilities for ordinary day to day requirements.[30]

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[29] Coogan, Vice President, Alpha (R) Tr. 24183-84, 24190-91, 24362-64.
Resp. Exs. 797-800: Letters, late in April, between Alpha and their dealers.
Scott, President, Keystone (R) Tr. 27579-80, 27609.
McKee, Vice President, West Penn (R) Tr. 27746.
Warren, Vice President, Southwestern (R) Tr. 28953-55.
Lewis, Manager, Volunteer (R) Tr. 31575, 32992.
Resp. Ex. 2198 A: Letter, 4/12/38, Volunteer to Procurement.
Warren, Vice President, Bessemer (R) Tr. 32160.
Koch, Vice President, Lone Star (R) Tr. 32746.
Resp. Ex. 37: Letter, 4/13/38, Lone Star to Procurement.
Porter, President, North American (R) Tr. 33898, 33900-01, 34095.
McGovern, Sales Manager, Hermitage (R) Tr. 36291, 36364-65.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37895.
Dannelly, Vice President, National (R) Tr. 39649.
Dawson, Vice President, Medusa (R) Tr. 40085.

[30] Brobston, President, Hercules (C) Tr. 10594.
Scott, *supra*, Tr. 27579, 27609.
McKee, *supra*, Tr. 27746.
Lewis, *supra*, Tr. 31574-75, 32991-92, 32996-97.
Resp. Ex. 2198 A: Letter, 4/12/38, Volunteer to Procurement.
Warren, *supra*, Tr. 32150-51.
Porter, *supra*, Tr. 33898.
McGovern, *supra*, Tr. 36287.
Letzkus, *supra*, Tr. 37895.
Dawson, *supra*, Tr. 40085.

Executives of numerous respondents testified that they had no agreement, understanding or conversation with their competitors as to the action which they took with respect to this invitation.[31]

c. Ohio-West Virginia: New Jersey

As stated above these invitations were opened on May 18, 1938 following the "Good Friday" invitation. The invitation for 29,500 barrels for use in Ohio and West Virginia was issued to 45 manufacturers, and the invitation for 5,500 barrels for use in New Jersey was issued to over 20 manufacturers and dealers. F.o.b. mill prices were requested and the destinations were not specified. No bids were received on either invitation.[1]

Executives of various respondents testified that they had no agreement with their competitors with respect to refraining from bidding on these invitations, that there was no discussion concerning them among competitors or at Institute meetings and that their decisions were entirely their own.[2]

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[31] Porter, President, North American (R) Tr. 33903-04, 34096-97.
McGovern, Sales Manager, Hermitage (R) Tr. 36287, 36292.
Alexander, President, Missouri (R) Tr. 37277.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37890, 37901.
Browder, Vice President, National (R) Tr. 39651.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39847.
Warren, Vice President, Bessemer (R) Tr. 28996.

[1] Peoples, U. S. Director of Procurement (C) Tr. 10264-66; and Com. Exs. 1391, 1394 (Ohio, West Virginia), 1395, 1399 (New Jersey).

[2] Bates, Sales Manager, Federal (R) Tr. 30515-16, 30804-08.
Warren, *supra*, Tr. 28996.
Letzkus, *supra*, Tr. 37902-03.
Sweeney, Vice President, Edison (R) Tr. 35797.

Typical of the reasons given by executives of various respondents why their companies did not bid are the following:

Aetna:	Because quoted prices in the areas were too low.[3]
Edison:	Because of criticism by dealers over its bid on the "Good Friday" invitation and, not having received an award there, it concluded that the government was not interested and did not bid on subsequent lettings.[4]
Federal:	Because it does not solicit in these states and other manufacturers could bid much cheaper. Moreover, it considers that it has the right to sell to whom and when it chooses. It is opposed to f.o.b. mill prices as a matter of policy and cannot make a special policy to fit any particular type of customer.[5]
Green Bag, W. Va.:	One reason was that the invitation called for special specifications under which it had never manufactured cement before.[6]
Kosmos:	Because it did not think it had much chance of getting the business in view of its prior experience and unfavorable dealer opinion on its bid on the "Good Friday" invitation.[7]
Petoskey:	Because it was not selling in Ohio or West Virginia at the time and did not operate in that territory.[8]

[3] Calvin, President, Aetna (R) Tr. 30110-13.

[4] Sweeney, Vice President, Edison (R) Tr. 35796-97.

[5] Bates, Sales Manager, Federal (R) Tr. 30515-16, 30837-39.

[6] Wood, General Manager, Green Bag, W. Va. (R) Tr. 29540-41.

[7] Horner, President, Kosmos (R) Tr. 36941-42.

[8] Lucas, Vice President, Petoskey (R) Tr. 38765.

d. Miscellaneous Lettings on Which Particular Respondents Did Not Bid

Commission's counsel stated on the record that he did not "contend for a moment" that "the mere fact that a company * * * did not bid on every transaction" was collusive, in the absence of "affirmative evidence". He said further "they are simply out of the picture, they could not bid if they wanted to, too far away, and all sorts of reasons why."[1]

Executives of numerous respondents denied that they had any agreement or understanding with competitors in connection with refraining from bidding on sealed bids in general or on particular invitations and gave a wide variety of reasons covering instances both before and after the complaint. A principal reason was that a project was outside of a bidder's normal marketing territory. Others were that freight rates were too high; destination prices and mill nets too low; prices filed with the Code Authority on particular lettings were too low; some lettings involved sales normally handled through dealers; others involved trucking services and delivery at particular destinations which a respondent was not in a position to furnish; and various post-complaint invitations were indefinite as to the time of shipment or destination, or called for special cements not previously manufactured.[2] In addition the non-

[1] Wooden, Counsel to the Commission (R) Tr. 25285.

[2] *Denials of agreement*:
Alexander, President, Missouri (R) Tr. 37276-78.
Koch, Vice President, Lone Star (R) Tr. 32737-38.
McGovern, Sales Manager, Hermitage (R) Tr. 36293.
Ackerman, Vice President, Lawrence (R) Tr. 31195.
Davis, President, Superior (R) Tr. 29597-98.
Warren, Vice President, Bessemer (R) Tr. 28996.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37903.

[Continued on page 970]

respondent, South Dakota State plant did not bid on several post-complaint invitations of the Procurement Division because they called for special cements which it did not manufacture; it did not have freight rates to the areas called for; the destinations were not shown and it did not care to bid in such cases.[8]

F. Tennessee Valley Authority (TVA).

The evidence digested here covers: (1) The purpose of the consideration given by TVA to building its own cement plant and its independent reasons for determining not to build; (2) the negotiations which it instituted and carried on with respondents in the area for the purpose of arriving at what it considered to be a fair price at which to buy rather than to produce; (3) the circumstances and nature of the price "formula" which TVA "announced"; and (4) the facts concerning its lettings of March 19 and October 15, 1934.

[Continued from page 969]

Reasons for not bidding:
Warren, Vice President, Bessemer (R) Tr. 32126-27, 32150-51.
Alexander, President, Missouri (R) Tr. 37276-78.
Roberts, Traffic Manager, Volunteer (R) Tr. 31876-77.
Coogan, Vice President, Alpha (R) Tr. 24114, 24077-78, 24050-51.
Moore, Vice President, Dewey (R) Tr. 47021-22, 47001.
Brooke, Vice President, Monarch (R) Tr. 42258-59, 42281-86.
Manley, General Manager, Hawkeye (R) Tr. 41761-62.
Koch, Vice President, Lone Star (R) Tr. 32738.
Hoenig, Sales Manager, Nebraska (R) Tr. 42162-64.
Blair, Sales Manager (El Paso), Southwestern (R) Tr. 39128-30, 39092-93.
Warren, Vice President, Southwestern (R) Tr. 28991.
Dannelly, Vice President, National (R) Tr. 39677.
Calvin, President, Aetna (R) Tr. 30309-10.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38433.

[8] Hartley, Sales Manager, South Dakota State Cement Plant (R) Tr. 41547, 41551-52.

The Tennessee Valley Authority was created by statute on May 18, 1933 "For the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control destructive flood waters in the Tennessee River and Mississippi River Basins • • •" (48 Stat. 58). It was given power, among others things, "to construct dams • • • in the Tennessee River and its tributaries" (48 Stat. 60).

Dr. Morgan had estimated that the various projects of TVA would require about ten million barrels of cement over a period of approximately eight years.[1]

Major Eckel, Chief Geologist of TVA since the fall of 1933,[2] testified concerning the circumstances which preceded the "consideration" of building a publicly owned plant. He was not sure that he was the "originator" of the "idea", or of the exact date when it occurred, but stated that his job was "to find a site for it".[3] Prior to November 1933, he had been led to consider such a plant by matter which he "read • • • in the papers" concerning what he called "a hold-up of the Government" in "the Illinois case" involving some highway bids to that state in 1933 which were publicized by the Governor and taken up by Secretary Ickes. Yet he "had nothing to do with" the Illinois case.[4] [Evidence relative to the Illinois highway bids in 1933 is set forth in Part IV A, *supra*, pp. 731-41.]

Eckel thought that it would pay the Government to have a cement mill in every Bureau of Mines District "that you

[1] Morgan, Chairman, TVA (C) Tr. 1963.

[2] Id., Tr. 1931.

[3] Id., Tr. 1950-51.

[4] Id., Tr. 1952-53.

could use to argue with".[5] He said further that there was an offer of a small, rather cheap plant of Cumberland at Cowan, Tennessee which was not in bad shape and which might be operated fairly economically, but had not been operated at over 20% of capacity "owing to bad business". However, this plant could serve only the dam at Chickamauga and not the larger ones at Wheeler and Pickwick.[6] A few months later he discussed with Affleck, President of Universal Atlas, the idle capacity of cement mills which then were running about "a third full". He told Affleck that if about one-third of the existing capacity were scrapped, the remaining mills would be better off and that "high prices" would have to be maintained in order to salvage "the poorest mills". He testified that Affleck "disagreed with me".[7]

In November 1933 the same witness looked over the situation at Norris but "dropped" that because work had already started there and "there was not any great inducement to build the plant".[8]

By that time some of the cement manufacturers had learned about "the proposed publicly owned plant" and on September 20, 1933 A. J. R. Curtis of the Portland Cement Association wrote to Young, President of Lehigh, asking for suggestions for constructive publicity "to have our case presented to the public". He said that he had asked Blaine Smith, then President of Penn-Dixie, to send along anything helpful, "particularly facts concerning capital, losses, capacity, and shipments in the Tennessee area."[9]

On February 3, 1934 A. M. Miller, Manager of TVA's "old fertilizer plant" at Muscle Shoals, wrote to Dr.

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[5] Eckel, Chief Geologist, TVA (C) Tr. 1953.

[6] Id., Tr. 1951-52.

[7] Id., Tr. 1944-45 and see (C) Tr. 1935-36.

[8] Id., Tr. 1950-51.

[9] Com. Ex. 836-2 E, 2 F.

Morgan concerning the possibility of using part of that plant for the manufacture of cement. Later studies indicated that it would be "very expensive and not feasible • • •."[10] In June 1934 Major Eckel made a report in which he recommended definite plans "looking towards" the "possible" manufacture of cement by TVA.[11]

The testimony and records of Doctor Morgan, Chairman of TVA, who was called as a witness on behalf of the Commission, show the following:

TVA did not want to build a cement mill "except as a last resort" and not if it could buy cement at a reasonable price.[12] It represented from the outset of the negotiations that it would build if it did not receive such a price.[13] It was using a "method that was more effective in getting a price reduction" than "asking for bids".[14] This "method" was put to the interested respondents by Dr. Morgan and reported in his memorandum to the Directors of TVA dated February 28, 1934, as follows:

[Italicized part quoted in Fdgs. Par. Sixteen (f)]

> *"If bids received should not be reasonable in the terms of these findings, then the Tennessee Valley Authority would take such action as it should see fit toward the production of its own cement."*[15]

On September 18, 1934 when TVA announced to the manufacturers its "formula" price of $1.30 f.o.b. the second nearest mill freightwise, and again by letter dated September 19, 1934, it "emphasized" that "It is our intent to build a cement plant if average price • • • is higher

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[10] Morgan, Chairman, TVA (C) Tr. 2139-40.

[11] (C) Tr. 1957-59.

[12] Morgan, *supra*, Tr. 2171.

[13] Com. Ex. 344 A-E: Report 2/28/34: Morgan to Board of Directors of TVA.

[14] Morgan, *supra*, Tr. 2011-15.

[15] Com. Ex. 344 A-E.

than this'' and that if the manufacturers could not sell at the price indicated, it would avail itself of ''the peculiarly advantageous circumstances for manufacture in which we find ourselves''.[16] It had given a similar notice by telegram a short time before (Com. Ex. 354 A).

While TVA was making these and other statements of its intent to build and as to its ''advantageous circumstances'' for building, and at the time when it ''announced'' the ''formula'' price it knew:

(1) That its appropriation had been ''cut'' in half by Congress and that ''For us to build * * * and then get no more appropriations would have been an awkward situation'';

(2) That if it built it would have but one source of supply which would have been less ''desirable'' than the several mills of the respondents in the area because it would deprive T.V.A. of ''the expediency of continuity of service'' and give it a higher freight rate for the furthest dams;

(3) That its successful operation of a mill was uncertain because ''a prospectus of profits'' does not always ''pan out * * * in a shop'';

(4) That to operate such a mill would mean an added responsibility which Dr. Morgan wanted to ''avoid''; and

(5) That it would take about a year to build a mill and set it in operation.[17]

Dr. Morgan's testimony and records show further:

As shown by the transcript of his telephone conversation with Smith of Penn-Dixie on September 26, 1934, the interested respondents accepted the ''formula'' price al-

[16] Com. Ex. 355 A-B.

[17] Morgan, Chairman, TVA (C) Tr. 2107-11.

though they considered it "less than * * * fair" and "too low" and only on condition that they have "definite assurance * * * that you will not proceed with the building of the plant."[18] [Browder of Penn-Dixie, which bid and filed with the Code Authority the same "formula" price which had been "announced" by TVA and which the other bidders "met", testified that the price was not quoted "voluntarily" but "to prevent the building of the mill."][19] TVA believed the price which it arrived at by the means described above, and for which it purchased the cement, to be "reasonable and fair"[20] and, upon fulfillment of the contracts, it would result in "a saving of about $2,000,000."[21]

Dr. Morgan testified that sometime prior to February 27, 1934, although he could not fix the date exactly, he met John Treanor of Los Angeles by accident in a hotel in Washington and had breakfast with him. Treanor was then the President of Riverside, which company was located "entirely outside the bidding area". Morgan said he had known Treanor, who was a director of the Institute, for a number of years and that Treanor was in Washington "on the Cement Code matters" and was active in trying to bring about "understanding between the Government and the industry."[22]

Morgan had several talks with Treanor at different times, the subjects of which were not "very clear" in his mind.[23] He believed he discussed his own experience in earlier purchases of cement "on local government projects, but not the Federal Government projects," and that they discussed the purchase of cement for Boulder Dam by the

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[18] Com. Ex. 1493 A-B.

[19] (R) Tr. 38393.

[20] Morgan, Chairman, TVA (C) Tr. 2143.

[21] Id., Tr. 2014.

[22] Id., Tr. 1977-78, 2000, Com. Ex. 344 A-E.

[23] Id., Tr. 1978, 2000-01.

Reclamation Bureau. Treanor told him that his relations with the Bureau on that project had been good, that he thought the project was excellently planned and that his respect for government operation had been much enhanced by it.[24] Dr. Morgan said he told Treanor also "of my difficulty in the situation, that we were receiving identical bids and it gave me no basis of judgment to tell whether our prices were reasonable"[25] and that he was prompted to consider the advisability of TVA constructing its own mill because "We received bids that were substantially identical".[26] His testimony in that regard is shown by other evidence to have been inaccurate. He had with him on the stand, at the time, only a "summary * * * without the dates" of the first cement purchases which were made by TVA from the interested respondents on the Norris and Wheeler Dam projects. The identical bids which he described were on TVA's letting of March 19, 1934. That letting occurred three weeks or more after his conversations with Treanor and was the first TVA letting bid upon by any respondents as shown by the abstract of bids in the record.[27] However, the witness also mentioned two dealers, namely Southern Cement Company and Cheney Cement & Lime Company, which made identical bids of $2.25 a barrel on quantities between 2500 and 5000 barrels,[28] and there is no evidence as to when their bids were submitted.

Dr. Morgan testified further that he felt at the time it was not in the public interest to enter into a large construction program calling for several million barrels of cement with no actual knowledge of "how much we ought to be paying" and that "the only way to find that out was

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[24] Morgan, Chairman, TVA (C) Tr. 2000-02.

[25] Id., Tr. 1978.

[26] Id., Tr. 1977.

[27] Id., Tr. 1969-77, Com. Ex. 397.

[28] Id., Tr. 1972.

to make studies as to what it would cost us to make our own cement".[29] He said that he talked the matter over with Treanor who suggested a discussion with some of the men in the industry, and that he asked Treanor to arrange a meeting for that purpose.[30] As shown by Dr. Morgan's memorandum to the Board of Directors of TVA describing the meeting, it was held on February 27, 1934 and the others present besides Morgan and Treanor were Conn, President of the Institute, Porter, President of North American and a Director of the Institute, and Smith, President of Penn-Dixie. As previously noted he said in the memorandum that TVA "would prefer to buy cement rather than to make its own." He said further that "the amount to be used is great enough to justify the building of a cement plant rather than the payment of unjustified prices. * * * On the other hand * * * The cement industry, by having a relatively single object, should be able to concentrate on the production of cement and to perform a public service which would justify a reasonable profit to the industry. So far as my own point of view is concerned, the administration of the Tennessee Valley Authority would prefer to be engaged with its own specific duties, and to profit by the judgment and experience of the cement industry * * *".[31]

The memorandum also shows that Dr. Morgan suggested to the cement manufacturers that their representatives and representatives of TVA "get together to formulate procedures and methods for making * * * an inquiry" to discover whether the price at which cement is offered is reasonable.[32]

The memorandum gave Dr. Morgan's "personal impression" of the "opinion" of the individuals present concerning competition in cement as follows:

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[29] Morgan, Chairman, TVA (C) Tr. 1977.

[30] Id., Tr. 1978.

[31] Com. Ex. 344 A-E.

[32] Id.

[Italicized part quoted in Fdgs. Par. Sixteen (f)]

*"We discussed the Tennessee Valley Authority and its building program, and then discussed our need for cement. Mr. Conn and the others present undertook to explain to me the general nature of the organization of the industry. The personal impression I received from listening to them is that, in their opinion, uncontrolled price competition in a staple industry will tend to destroy that industry, that some kind of control is necessary for stabilization, and that the cement industry has sought to bring about such control; that the problem is a difficult one and has not been completely worked out, especially in its relation to the public. There might be superficial appearance of collusion and conspiracy against the public, when in fact there was only an honest effort to stabilize the industry for the benefit of everyone concerned * * *."*[33]

It also stated Dr. Morgan's "point of view" on identical bids as follows:

[Italicized part quoted in Fdgs. Par. Sixteen (f)]

*"Inasmuch as a call for bids results in receiving identical bids for cement, from our point of view as consumers there is no competition. * * *"*

It concluded with the statement that all who were present at the meeting expressed approval of the procedure outlined and that Smith of Penn-Dixie said he would present the proposal "to the companies in the Tennessee Valley territory". It also contained Dr. Morgan's recommendation that a suitable person be secured to represent TVA "in case a group of interested companies will take similar action".[34]

Dr. Morgan sent a copy of his memorandum to Smith, who was chairman of the committee for the interested man-

[33] Com. Ex. 344 A-E.

[34] Id.

ufacturers in the area, together with advice that the Board of Directors of TVA favored the steps which it outlined.[35]

Dr. Morgan testified that he objected to the basic "price system" as it was explained to him in his discussion with the cement manufacturers and had not made up his mind as to whether or not competition had broken down although it was explained to him "in a way to show that active competition continued to exist."[36] He said he was not aware that under the NRA Code each bidder filed its prices with the Code Authority and was notified as to what price all other bidders had filed.[37] He said also that his impressions regarding competition in cement "were partly the result of buying cement on other jobs and finding uniform prices."[38] Yet he testified that TVA was getting identical bids from a very considerable number of industries during the NRA code; that it was common practice at the time; that the Code seemed to justify such bids and that TVA's contracts contained a cancellation provision if they contradicted the Code which he said was "the law of the land" at the time.[39]

Porter, President of North American and a former college professor, testified that he attended the meeting of February 27, 1934 at Treanor's request because Treanor wanted to create a favorable impression with Dr. Morgan. He attended as an individual and not as a representative of either the Institute or his company which was outside of the area and did not bid on the TVA projects. He testified that Dr. Morgan said it was to the public interest to buy rather than to build a plant if TVA could have assurance it was not paying an excessive price; that the discussion

[35] Com. Ex. 345 A, B; Morgan, Chairman, TVA (C) Tr. 1999.

[36] Morgan, *supra*, Tr. 2018-19.

[37] Id., Tr. 2172-73.

[38] Id., Tr. 2173.

[39] Id., Tr. 2116-17, 2013-14.

related to how fairness of price could be determined; that Smith of Penn-Dixie offered to turn over all his company's books and records to TVA; that there was no discussion of "uncontrolled price competition" with respect to which Dr. Morgan stated his "personal impression" in his memorandum to the directors of TVA; that he understood negotiations were to be carried on with companies which normally shipped into the area; and that he was not concerned with or advised of the subsequent progress of the negotiations.[40]

Hanahan, President of Volunteer, one of the interested companies whose plant was the nearest to the Norris Dam site,[41] testified that Treanor was at no time authorized to represent Volunteer in the TVA negotiations.[42]

Dr. Morgan testified that the only data which TVA received "through the industry" was "a one page chart * * * a synopsis of Price, Waterhouse data for the industry" which was received "immediately after this first meeting I spoke about. Thereafter our relationships were not with the industry, they were with a committee representing certain companies within our area."[43] He testified further that the relations which TVA had after the first meeting which Treanor had arranged were "almost absolutely solely with this Committee * * * and with ten companies * * * so far as I know I had no contact with the Institute in any way, shape or manner during these negotiations."[44]

President Roosevelt knew about the negotiations which were to be conducted and requested that TVA arrange to keep the Department of Interior and the War Department

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[40] Porter, President, North American (R) Tr. 33935-49.

[41] Morgan, Chairman, TVA (C) Tr. 2103.

[42] (R) Tr. 38673-77.

[43] (C) Tr. 2062-63.

[44] Morgan, *supra*, Tr. 2144.

acquainted with their progress.[45] In addition Dr. Morgan appointed Paul David as a representative "to keep in touch with the Federal Trade Commission and with the Code Authority."[46] Dr. Morgan personally visited the Federal Trade Commission and discussed the negotiations with the Commission's chief counsel and other members of the Commission.[47]

On March 3, 1934, Dr. Morgan's proposal for negotiations and an inquiry concerning "fair price" was adopted by resolution of TVA. Morris E. Leeds, of Leeds & Northrup Co., of Philadelphia was appointed Chairman of the principal TVA committee, although it had "two or three" committees handling different phases of the negotiations. Members of these committees included Major Eckel, the geologist, who was suggested by Secretary Ickes, and by the Dean of Wharton School; also Paul David and Dr. Fetter of Princeton, who had been a consultant for the Federal Trade Commission.[48]

The committee representing the interested companies consisted of Blaine Smith of Penn-Dixie, Chairman,[49] Hanahan, President of Volunteer, Young, President of Lehigh, Kilian of Penn-Dixie and Treanor.[50]

Evidence which was stricken on motion of Commission's counsel and which is sought to be adduced by respondents shows that the committee represented "that part of the Cement Industry serving the Tennessee Valley, consisting of: 10 companies, owning 15 plants with 19,000,000 barrels

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[45] Morgan, Chairman, TVA (C) Tr. 2003, 2007-08.

[46] Id., Tr. 2002-03, 2165.

[47] Id., Tr. 2141-42, 2165.

[48] Id., Tr. 2073, 2145-46.

[49] Id., Tr. 2082-83.

[50] Com. Ex. 359 (Stricken, Resp. Ex. 2201 P; see Motion to Adduce Subject XIV (3), p. 53).

of annual producing capacity" [Resp. Ex. 2201 P; and see Motion to Adduce, Sub. XIV, subd. (3), at p. 53].

LETTING OF MARCH 19, 1934

There are in evidence abstracts of bids on two lettings by TVA, both during the NRA Code period. The first was opened on March 19, 1934, shortly after the negotiations were commenced and while they were in progress. It called for f.o.b. mill bids on 215,000 barrels for Norris Dam and on 100,000 barrels for Wheeler Dam.[51] The second and major letting was opened on October 15, 1934 after the negotiations had been concluded and the price "formula" had been "announced" by TVA and agreed to by the interested respondents.[52] The details of the October 15 letting are set forth *infra*, at p. 991 *et seq.*

On the March 19 letting bids were submitted by 11 respondents and 1 non-respondent (see list in footnote).[53]

On the Norris Dam, Volunteer, which was the nearest mill,[54] bid and filed with the Code Authority a mill price of $1.75, less 10¢ cash discount, together with a cost at destination (Coal Creek) of $2.0696, as compared with its commercial price for the same destination of $2.19.[55] Moreover, the invitation called for Type B cement which cost Volunteer from 7¢ to 10¢ more per barrel to manufacture than

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[51] Com. Ex. 397.

[52] Com. Ex. 401.

[53] List of bidders:

Alpha	Louisville (Norris Dam only)	Signal Mountain
Cumberland	Marquette	Universal Atlas
Hermitage	National (Wheeler Dam only)	Volunteer
Lehigh		Penn-Dixie (Com. Ex. 397)
Lone Star		

[54] Morgan, Chairman, TVA (C) Tr. 2103-04.

[55] Com. Ex. 397; Lewis, Manager, Volunteer (R) Tr. 31450, 31453-55; Com. Ex. 398 A-B: Letter 3/23/34, Code Authority to Garity; Resp. Ex. 2192 D: Volunteer's contract.

its ordinary cement.[56] The remaining bidders made varying f.o.b. mill bids of lesser amounts than Volunteer but their computed costs at destination were substantially the same as Volunteer's.[57] Alpha's f.o.b. mill bid of $1.5776768 was arrived at by deducting the land grant freight rate from the filed destination cost of $2.0696.[57a] Penn-Dixie's f.o.b. mill bid of $1.5996 was arrived at by deducting the commercial freight rate from the filed destination cost figure.[57b]

On the Wheeler Dam, Volunteer bid and filed with the Code Authority the same mill price of $1.75, less 10¢ discount.[58] All other companies filed and bid a destination price of $2.16 together with varying mill prices which reflect deduction of land grant freight rates from a destination cost of $2.02383 on file with the Code Authority.[59] Hanahan, President of Volunteer, testified that the price which his company filed on this letting was not the result of agreement with the other bidders.[60] Pearson, Secretary-Treasurer of Cumberland, testified to the same effect.[61]

The Code Authority made a study of the bids and advised TVA that all excepting those of Volunteer were partly or wholly in violation of the open price filing provisions of the Code.[62] For example, Penn-Dixie had not filed

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[56] Hanahan, President, Volunteer (R) Tr. 38662; Com. Ex. 396 H-K, Y; Garity, Director of Purchases, TVA (C) Tr. 2632-36.

[57] Com. Ex. 397.

[57a] Com. Ex. 399 E: Alpha's letter to Code Authority dated March 19, 1934.

[57b] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38314.

[58] Lewis, Manager, Volunteer (R) Tr. 31450, 31453-54; Com. Exs. 397, 398 A-B.

[59] Com. Exs. 397, 398 A-B.

[60] Hanahan, *supra* (R) Tr. 38662.

[61] (R) Tr. 39864.

[62] Com. Ex. 398 A-E: Letters dated 3/28/34 and 3/29/34, Rader, Code Authority to Garity, TVA.

its mill prices with the Code Authority, because it considered that they were the equivalent of prices which had already been filed.[63] Browder, Traffic Manager, testified that Penn-Dixie took destination prices filed by one of its competitors with the Code Authority and deducted its full commercial rates to arrive at its f.o.b. mill quotation.[64] Correspondence with the Code Authority shows that other bidders used the filed prices in computing their bids.[65] Notwithstanding the advice of the Code Authority to TVA as to non-compliance with the Code and the requirement for compliance in TVA's contracts, awards were made by taking the three mills nearest the projects which TVA felt could and would make delivery based on their ability to supply the cement when needed.[66] The awards were as follows:

Norris Dam	Wheeler Dam
Volunteer—125,000 bbls.	Alpha—35,000 bbls.
Signal Mountain—45,000 bbls.	Cumberland—30,000 bbls.
Penn-Dixie—45,000 bbls.	Lehigh—35,000 bbls.[67]

TVA received from the successful bidders the full benefit of subsequent freight rate reductions which became effective in April and May, 1934.[68]

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The evidence relative to the cost inquiry and the negotiations which continued in the interim prior to the letting

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[63] Browder, Traffic Manager (R) Tr. 38314-15.

[64] Id.

[65] Com. Ex. 399 C: Letter 3/19/34, Phelan, Asst. Sales Manager, Marquette to Code Authority.
Com. Ex. 399 E: Letter 3/19/34, Coogan, Vice President, Alpha to Rader, Code Authority.

[66] Garity, Director of Purchases, TVA (C) Tr. 2638.

[67] Morgan, Chairman, TVA (C) Tr. 1972.

[68] Lewis, Manager, Volunteer (R) Tr. 31457-58; Browder, *supra*, Tr. 38317-20.

of October 15, 1934 has been largely stricken from the record. The Commission originally introduced evidence relative to estimates of the cost of construction of a cement plant for the purpose of creating an inference that cement prices submitted to TVA were unduly high in relation to the costs of production. Respondents, to dispel any such inference, introduced testimony and contemporary documentary evidence showing the full details of the negotiations regarding the cost survey and detailed cost figures of Volunteer. Objections by Commission's counsel to the introduction of respondents' evidence were at first overruled by the Trial Examiner on the ground that under the pleadings, reasonableness of price was material and that the evidence was calculated to rebut that of the Commission. But later the Trial Examiner, over objection of respondents' counsel, granted the Commission's motion to withdraw its own evidence on the subject and to strike all related evidence of respondents and expressed his purpose "to eliminate the cost matter entirely from here on and from here back."[69] Since there was still left in the record evidence from which inferences of unfairness of price might be drawn, respondents have moved to adduce certain of their stricken evidence consisting of "Cost Data and Explanation of Negotiations Relating to Proposed Tennessee Valley Authority Cement Plan." (Motion to Adduce, Subj. XIV, subd. (3); and see pars. 66-68, 74-77, at p. 48, *et seq.*).

On September 3, 1934, following the cost investigation and negotiations as to which the evidence was stricken, Dr. Morgan sent a telegram to Smith, chairman of the companies' committee advising of TVA's plan "to advertise for bids * * * and also for building a cement plant immediately after Thursday (September 6) meeting." The telegram read:

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[69] Tr. 32929-36, 32960.

[Italicized part quoted in Fdgs. Par. Sixteen (f)]

"IT IS IMPERATIVE THAT WE DETERMINE OUR COURSE AS TO PURCHASE OR MANUFACTURE OF CEMENT WITHOUT FURTHER DELAY STOP WE PLAN TO ADVERTISE FOR BIDS FOR CEMENT AND ALSO FOR BUILDING A CEMENT PLANT IMMEDIATELY AFTER THURSDAY MEETING STOP BIDS RECEIVED FOR CEMENT WILL THEN DETERMINE OUR COURSE STOP THURSDAY MEETING SHOULD BRING NEGOTIATIONS TO A CONCLUSION STOP IN OUR ESTIMATE OF MAKING CEMENT AT SHEFFIELD THIRTEEN CENTS FOR DEPRECIATION SEEMS AMPLE AND OUR ESTIMATE AS PRESENTED TO YOUR TECHNICAL COMMITTEE SEEMS TO US TO REQUIRE LITTLE MODIFICATION."[70]

On September 5, 1934 Treanor sent to Smith a draft of his proposed reply to Dr. Morgan's telegram.[71] Smith wired Treanor on the same day as follows:

[Italicized matter quoted in Fdgs. Par. Sixteen (f)]

"RETEL JUST RECEIVED CONSIDER YOUR PROPOSED WIRE ENTIRELY JUSTIFIED AND WITH SUCH REVISIONS AS YOU MAY MAKE BELIEVE IT SHOULD BE SENT AS NIGHTLETTER TONIGHT AS OUR MEETING IS AT TEN THIRTY CENTRAL STANDARD TIME THURSDAY MORNING SEPTEMBER SIXTH WILL KEEP YOU POSTED."[72]

On September 6, 1934 Treanor sent a night letter in reply to Dr. Morgan in which he said that TVA had gone through only "a form of investigation" and that it had now "adopted a course calculated merely to coerce the companies by threatened use of arbitrary powers to build the Sheffield plant." He said he believed the project would result in disappointment to TVA and injury to the administration. He compared TVA's "peremptory decision" with the detailed findings submitted by the companies and their desire for "frank discussion" and cooperation with the Government. The night letter, in full, was as follows:

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[70] Com. Ex. 354 A.

[71] Com. Ex. 562-12 I-N.

[72] Com. Ex. 562-12 H.

[Italicized part quoted in Fdgs. Par. Sixteen (f)]

"DEAR DR. MORGAN YOUR NIGHTLETTER TELEGRAPHED ME BY COMMITTEE STOP INASMUCH AS YOU ORIGINALLY SUGGESTED MY PARTICIPATION THIS MATTER I FEEL ENTITLED TO WIRE YOU MY PRESENT VIEWS STOP *THE FACT THAT I HAVE LONG MAINTAINED AND DO MAINTAIN A PERSONAL LOYALTY TO YOU ENTIRELY FREE FROM SELF INTEREST ALSO ENTITLES ME IN MY JUDGMENT TO EXPRESS MYSELF FREELY AND FRANKLY IN A PERSONAL WAY NOT IN ANY WAY AS MEMBER OF INDUSTRY COMMITTEE STOP I AM DISCOURAGED AND DISILLUSIONED BY THE CONDUCT OF THIS INVESTIGATION PURPORTNG TO BE A FAIR INQUIRY TO DISCOVER THE TRUTH STOP TO MY MIND YOU HAVE KEPT THE WORK OF PROMISE TO THE EAR AND BROKEN IT TO THE HOPE STOP YOU HAVE DONE THIS UNWITTINLY I BELIEVE THROUGH A DEEPSET GENERAL PREJUDICE AGAINST BUSINESS MEN A PREJUDICE UNWARRANTED AS I BELIEVE IN THIS CASE AT ANY RATE STOP I THINK THAT WHILE YOU HAVE GONE THROUGH A FORM OF INVESTIGATION OF THIS CEMENT MATTER AND WHILE YOU MAY BELIEVE THAT YOU HAVE TRULY INVESTIGATED IT YOU HAVE NOT OPENED YOUR MIND STOP YOU HAVE IN FACT AS I SEE IT ADOPTED A COURSE CALCULATED MERELY TO COERCE THE COMPANIES BY THREATENED USE OF ARBITRARY POWER TO BUILD THE SHEFFIELD PLANT* STOP I ASK YOU FAIRLY TO CONSIDER THE RECORD STOP THE INDUSTRY DISCLOSED DATA AS TO ITS OWN OPERATIONS WITHOUT RESERVATION AND IN ALL DESIRED DETAIL STOP IN RETURN IT RECEIVED THIS SUMMARY MEMORANDUM HANDED TO MR. KILIAN BY MR. LEEDS ON JULY ELEVENTH ANNOUNCING THE AUTHORITYS PEREMPTORY DECISION TO PAY NO MORE THAN ONE DOLLAR SIXTEEN CENTS PER BARREL FOR CEMENT STOP ESPECIALLY UNJUST SEEMED TO ME THE WHOLESALE DISALLOWANCE OF OVERHEAD ITEMS WITHOUT PARTICULARS ALSO THE DECISION TO BASE THE PRICE UPON THE AVERAGE MANUFACTURING COST OF LOW COST YEARS. REFUSING TO ALLOW FOR DEMONSTRABLE AND UNDENIABLE INCREASES IN CURRENT COST STOP AFTER RECEIPT OF THE MEMORANDUM THE CEMENT INQUIRY ASSUMED ANOTHER PHASE STOP BOTH SIDES AGREED TO SUSPEND SEARCH FOR A PRICE FAIR PER SE AND TO SEEK RATHER TO DISCOVER A FIGURE EQUIVALENT TO THE GOVERNMENTS COST IN CASE THE SHEFFIELD PLANT IS BUILT STOP UNLESS THIS METHOD OF FIXING THE INDUSTRY PRICE WAS TO BE A TRAVESTY OF FAIR PROCEDURE IT WAS IMPLIED THAT SOUND PRINCIPLES OF ESTIMATING AND ACCOUNTING WOULD BE FOLLOWED STOP I ASK YOU TO COMPARE IN A SPIRIT OF DETACHMENT THE INDUSTRYS TREATMENT OF THIS SUBJECT WITH YOUR OWN STOP THE INDUSTRY SUBMITTED ITS FINDINGS IN COMPLETE DETAIL ENABLING YOU TO CRITICIZE THEM IN DETAIL STOP

THAT THESE MEN WERE ENTIRELY SINCERE I KNOW FROM HAVING BEEN PRESENT WHEN THE REPORT WAS BEING WRITTEN STOP I KNOW THE INDUSTRY STANDS OPEN MINDED AND READY TO ACKNOWLEDGE ERRORS OR OMISSIONS IF ANY WHICH MAY BE DISCOVERED IN THIS REPORT STOP THE NEXT STEP IN SIMPLE FAIRNESS SHOULD BE FRANK DISCUSSION OF THE REPORT IN DETAIL NOT PEREMPTORY AND WHOLESALE DISAVOWALS THAT IT HAS ANY MERIT STOP I ASK YOU TO COMPARE THE INDUSTRYS EFFORT AT REASONED TREATMENT OF THE ALL IMPORTANT AMORTIZATION PROBLEM WITH YOUR OWN ARBITRARY PRONOUNCEMENT THAT A THIRTEEN CENT RATE OF AMORTIZATION WILL BE USED STOP WITHOUT EXPLANATION YOU HAVE WITHDRAWN YOUR OWN EARLIER DETERMINATION OF A TWENTY CENT RATE STOP YOU CONTRIBUTE NOTHING IN THE WAY OF REASONED JUSTIFICATION OF YOUR NEW POSITION STOP WHY STOP *IS YOUR JUDGMENT FINAL INFALLIBLE AND NOT TO BE QUESTIONED BY THE PEOPLE WHOSE VITAL INTERESTS ARE SO DEEPLY INVOLVED STOP TO ME YOUR PRESENT ACTION IS BALD ASSERTION OF THE IMMENSE POWER WHICH IS YOURS THROUGH YOUR CONTROL OF VAST GOVERNMENT FUNDS STOP IT IS A RUTHLESS DECLARATION THAT THIS POWER CAN BE USED AT WILL WITHOUT OBLIGATION TO JUSTIFY ITS USE STOP IT IS TANTAMOUNT TO ARBITRARY DETERMINATION OF THE INDUSTRY PRICE UNDER THREAT OF DIRE PUNISHMENT IN CASE OF RESISTANCE STOP* FAR INDEED IS THIS FROM THE SPIRIT OF OUR INITIAL TALKS AND OF YOUR OWN LETTER OF MARCH FIRST VERY FAR IS IT FROM THE SPIRIT OF TOLERANCE AND UNDERSTANDING WHICH I ASSOCIATE WITH YOU STOP YOU HAVE BEFORE YOU AN INDUSTRY READY AND EAGER TO COOPERATE WITH THE GOVERNMENT IN A SPIRIT OF COMPLETE FAIRNESS AND READY TO HAVE ITS FAIRNESS AND SINCERITY PUT TO ANY TEST STOP *YOU HAVE THE OPPORTUNITY TO AID IN THE DEVELOPMENT OF A PROCESS OF COOPERATION BETWEEN INDUSTRY AND GOVERNMENT OR TO DEAL THE PROSPECTS OF SUCH COOPERATION AS TO THIS PARTICULAR INDUSTRY A SERIOUS IF NOT FATAL BLOW STOP I TELL YOU ALSO AS A FRIEND IN CANDOR AND IN ALL SINCERITY THAT IT IS MY BELIEF THAT IF YOU EMBARK ON THIS PROJECT IN THE FACE OF THE ALTERNATIVE WHICH IS BEFORE YOU COMMA IT WILL RESULT IN DISAPPOINTMENT AND CHAGRIN TO YOU AND YOUR ASSOCIATES AND AN INJURY TO THE ADMINISTRATION OF WHICH YOU ARE A PART STOP I REMAIN WITH KINDEST FEELING.*"[73]

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[73] Com. Ex. 354 B-D.

On September 18, 1934 Dr. Morgan sent the following telegram to Smith saying that TVA intended to build a cement plant unless the cement manufacturers quoted a base price not to exceed $1.30 per bbl. f.o.b. the second nearest mill freightwise:

> "THE TVA INTENDS NOT TO BUILD A CEMENT PLANT IF CEMENT MANUFACTURERS QUOTE A BASE PRICE NOT TO EXCEED ONE DOLLAR AND THIRTY CENTS PER BARREL AT MILL PLUS FREIGHT TO DESTINATION STOP WHERE ONLY ONE MILL ENJOYS THE LOWEST FREIGHT RATE WILL CONSIDER ABOVE BASE PRICE PLUS FREIGHT FROM SECOND LOWEST FREIGHT POINT STOP IT IS TO BE UNDERSTOOD THAT THIS IS MAXIMUM THAT THE AUTHORITY WILL CONSIDER AND ANY QUOTATIONS SHOULD BE AT OR BELOW FIGURE LAST MENTIONED STOP IT IS OUR INTENT TO BUILD A CEMENT PLANT IF AVERAGE PRICE OMITTING HOLSTON AND FRENCH BROAD DAMS IS HIGHER THAN THIS STOP RATHER THAN NAME A LOWER PRICE WITH INTENT OF NEGOTIATING SMALL DIFFERENCES WE ARE STATING THE OUTSIDE MAXIMUM STOP IF ANY DIFFERENCES OF UNDERSTANDING REMAIN WE SUGGEST THEY BE CLEARED UP BY CONFERENCE BEFORE BIDS ARE SUBMITTED STOP IT IS ALSO UNDERSTOOD THAT ANY CHANGE IN FREIGHT RATES WILL BE ADJUSTED AS PROVIDED PARAGRAPH TWENTY FOUR OF INVITATION."[74]

Dr. Morgan testified that the above "formula" was "Announced by TVA"[75] "our Committee had decided * * * that $1.30 would be our outside figure * * * that we considered to be a fair mill price" * * * "to insure that we would get a supply, we made this $1.30 apply to at least two mills."[76] He reiterated "We did not want to have one successful bidder only and have to get all of our cement for one job from one mill."[77] He testified further that the interested manufacturers "were holding out between $1.45 and $1.50."[78] Garity, TVA Director of Purchases, testified concerning the "formula" on cross-examination:

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[74] Com. Ex. 355 A-B.

[75] (C) Tr. 2100.

[76] Id., Tr. 2103.

[77] Id., Tr. 2100.

[78] Id., Tr. 2111.

"Q. And the TVA itself suggested prices with reference to the same base isn't that so? A. We suggested that we would pay a maximum price of $1.30 per barrel net price f.o.b. mill * * * the second low mill."[79]

On the following day, September 19, 1934, Dr. Morgan wrote to Smith setting forth a copy of the "formula" telegram and again "emphasized that the price we had indicated should be considered * * * as a maximum price and not the basis for further bargaining * * *." He said further "I hope the result will be that we can purchase cement and not make our own * * *. If the industry cannot profitably sell cement at the price indicated, then * * * because of our peculiarly favorable situation (for manufacture), the savings * * * would be substantially greater * * * and therefore the public interest would be best served by the manufacture of cement by the Authority."[80]

Moreover, Dr. Morgan told Browder that TVA expected not only to furnish its own requirements but also to "keep this mill running to capacity by furnishing cement to other governmental agencies * * * State highways, departments, and to commercial shippers in the territory * * *."[81]

On September 26, 1934,[82] in the same telephone conversation in which Smith told Dr. Morgan that the manufacturers would "go along" if the government plant was not built, although the price was unfair (see pp. 974-75, *supra*), Smith asked Dr. Morgan to notify the Attorney General and the Comptroller General of the procedure taken so that there would be no charge of violating the law. Morgan agreed. Thereupon Smith prepared a statement of the negotiations up to that time and presented it to J. L. Fly,

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[79] Garity, Director of Purchases, TVA (C) Tr. 2718.

[80] Com. Ex. 355 A-B.

[81] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38330.

[82] Com. Ex. 1493 A-B.

Chief Counsel of TVA, and a former assistant to the Attorney General. Fly took the position that it would not be necessary to present the matter to the Attorney General and it rested there.[83]

LETTING OF OCTOBER 15, 1934

Following acceptance of TVA's formula as above described the major letting of October 15 was held on which prices f.o.b. destination were invited for 6,985,000 barrels of Type B cement to be furnished before January 1, 1941 at some 18 destinations throughout the area for construction of 10 dams.[84]

On this letting there were 13 respondents and one nonrespondent company which submitted bids for quantities varying from 50,000 barrels to the entire amount called for (see list in footnote).[85]

By letter dated October 9, 1934, Penn-Dixie filed with the Code Authority a "list of prices, terms and conditions of

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[83] Morgan, Chairman, TVA (C) Tr. 11308-15; Com. Ex. 1493 A-D.

[84] Com. Exs. 401, 402 A-C; Garity, Director of Purchases, TVA (C) Tr. 2657; Resp. Ex. 2918 K, P-S.

[85] List of bidders and quantities bid upon:

Alpha	for 5,200,000 barrels
Cumberland	for 1,600,000 barrels
Georgia	for 50,000 barrels
Hermitage	for 1,600,000 barrels
Kosmos	for 1,400,000 barrels
Lehigh	for entire amount
Lone Star	for entire amount
Louisville	for 800,000 barrels
Marquette	for 6,700,000 barrels
National	for 221,000 barrels
Penn-Dixie	for 7,500,000 barrels
Signal Mountain	for entire quantity
Universal Atlas	for 3,200,000 barrels
Volunteer	for 4,200,000 barrels

(Com. Ex. 401)

sale * * * applicable only to Tennessee Valley Authority * * * for the specific letting to be held October 15, 1934."[86]

Browder, Traffic Manager of the company, personally prepared the prices which were so filed and figured them "in accordance with Dr. Morgan's formula of a base at the second closest mill."[87] He testified that in computing the prices he did not consider quoting lower than the price formula laid down by Dr. Morgan and would not have quoted that low "voluntarily" but for the fact that "we had to * * * prevent the building of the mill." His testimony follows in detail:

> "We figured that was lower than any price that we wanted to voluntarily quote, but that we had to quote at least that figure to prevent the building of the mill, and we decided to do it hoping that we would thereby secure a large quantity of the cement, bring up the operation of our mills in the South which were down at a pretty low level at that time, and possibly break even on it, but at least reduce the manufacturing cost and overhead on our per barrel cost of manufacturing."[88]

He stated also that the Federal Government "demanded special price consideration" on the TVA project.[89] [Further stricken evidence is sought to be adduced by respondents which shows that the prices bid on the March 19 letting were not excessive and that the reduced prices bid on the October 15 letting were the result of concessions by the bidders, at grave risk of heavy losses in the face of TVA's mandate to accept its formula or else it would build a plant (Motion to Adduce, Subj. XIV, subd. (3), pars. 74-77).]

His company bid in three different ways on the letting so that TVA could take any delivery it wanted, namely,

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[86] Resp. Ex. 2919 A-D.

[87] (R) Tr. 38376-78.

[88] Id., Tr. 38393-94.

[89] Id., Tr. 38307.

at the dam site in Penn-Dixie's barges, to the rail-head on the river so that TVA could use its own barges and at the nearest rail delivery point to the dam site so that TVA would have an opportunity of trucking the cement from that point if it so elected.[90] He testified further "the other companies accepted that filing and met that price."[91]

By letter dated October 10, 1934 the Code Authority advised 21 respondent and non-respondent companies, including those who submitted bids, of the price filing which it had received.[92] Accordingly at the destinations where the different companies submitted bids they were identical.[93] The destination prices quoted by the various bidders were computed with the use of land grant rates furnished by TVA itself and of barge rates from the rail-head to the dam site furnished by the Cumberland River Sand Company, Nashville, Tennessee.[94]

Browder testified that he did not prepare the prices which were filed by Penn-Dixie in collaboration with any representatives of any other cement companies.[95] [Further stricken evidence is sought to be adduced by respondents which shows that the identical prices bid on the October 15 letting, which are cited in the Findings (par. 9, b), were not the result of "combination" or of "a pricing system" (Motion to Adduce, Subj. XIV, subd. (3), pars. 74-77).]

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[90] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38386-87.

[91] (R) Tr. 38390.

[92] Com. Ex. 925-6 A-6 D, and see Resp. Ex. 2919 A-D.

[93] Com. Ex. 401.

[94] Browder, *supra*, Tr. 38374, 38376-83, 38389-90; Resp. Exs. 2921 A-C: Letter, 10/6/34, Cumberland Sand to Penn-Dixie; 2920 A-C: Penn-Dixie's work sheet; 2919 A-D: Letter, 10/9/34, Penn-Dixie to Code Authority filing prices.

[95] (R) Tr. 38377.

Awards were made to 10 respondents in quantities ranging from 375,000 to 1,455,000 barrels (see list in footnote).[96]

Dr. Morgan testified that the amount paid by TVA for the cement which it purchased "averaged just a little less than $1.30 * * * mills * * * who were further away than the second mill * * * got less."[97] Counsel for the Commission made a statement on the record to the same effect.[98]

The same witness testified that the allotment of awards to the different companies "was made by Mr. Chambers, Mr. Garity and myself and then approved by the TVA Board. No representative of any cement company had anything to do with the allotment, nor knew anything about it * * * it was entirely a closed matter until it was put to the Board for approval."[99] He testified further "There was competition for allotment of cement under this contract. In making the allotments, we used our own judgment and not any recommendations from any individual cement companies."[100] He prepared a statement setting forth the considerations which influenced the distribution of purchases

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[96] List of Awards:

Alpha	375,000 barrels
Cumberland	390,000 barrels
Hermitage	350,000 barrels
Lehigh	615,000 barrels
Lone Star	500,000 barrels
Marquette	550,000 barrels
Penn-Dixie	1,445,000 barrels
Signal Mountain	880,000 barrels
Universal Atlas	475,000 barrels
Volunteer	1,355,000 barrels

(Com. Ex. 402-C; Garity, Director of Purchases, TVA (C) Tr. 2658)

[97] (C) Tr. 2098, 2100-01.

[98] Tr. 2099

[99] Morgan, Chairman, TVA (C) Tr. 2137.

[100] (C) Tr. 2132.

by TVA on the letting and furnished it to the companies which had submitted bids. The statement lists three "chief factors", as follows:

> "1. It is important that purchases be made from plants conveniently located for shipping and delivery, and from plants financially and physically equipped, so that the progress of concrete construction shall not be jeopardized by interruptions in delivery.
>
> 2. Within reasonable limits, those mills should be favored which have the lowest freight charges and the largest mill net prices, as in that way the cement industry as a whole will profit most from the orders being placed.
>
> 3. There should be a distribution of business among reasonably well situated plants so that the cement industry may have a fairly even flow of business in the several mills, rather than a series of violent fluctuations in production."[101]

[101] Com. Ex. 360 A.

PART V

COMPILATION AND DISTRIBUTION OF FREIGHT RATE INFORMATION

A. Introduction.

A freight rate book in the cement industry is a collection of the lowest rail freight rates on 100 pounds of cement from one or more shipping points to a number of destinations. The rates are compiled from the official tariffs published by the railroads and on file with the Interstate Commerce Commission and state regulatory bodies.[1] The books do not show water and truck rates because there are no official published tariffs of such rates.[2] For a good many years Institute books also contained a conversion table whereby the tariff rates, expressed in cents per cwt., might be converted into a rate per barrel of cement of 380 pounds.

Rate books have been compiled at least since 1910, when Alpha developed its own book,[3] and by associations of cement manufacturers[4] and by commercial agencies for sale to cement companies,[5] and compiled by a number of companies for their own use.[6] The Cement Manufacturers Protective Association compiled and distributed books from about 1915 to 1922 and, as to this rate information, the Commission found that it was "in much the same form

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[1] Reiter, General Manager, The Institute (C) Tr. 16864.
See also Freight Rate Books, Com. Exs. 994, 1000, 1110 A-EE, 3042, 3043, 3044, 3247; Resp. Exs. 156, 157.

[2] Reiter, *supra*, Tr. 4109-10.

[3] Coogan, Vice President, Alpha (R) Tr. 23260-63, 24602.

[4] Id., Tr. 23263-64.

[5] Id.

[6] Brobston, President, Hercules (R) Tr. 26170-72.

STATEMENT OF FREIGHT RATES

FROM

Bay Bridge, Ohio	Kenwood, Ky.	Silica, Ohio
Buffalo, N. Y.	Lincoln, Ind.	Speeds, Ind.
Burlington, Ind.	Manheim, W. Va.	Superior, Ohio
Castalia, Ohio	Middle Branch, Ohio	Toledo, Ohio
Cement City, Mich.	Mitchell, Ind.	(See Note 2)
Cleveland, Ohio	Neville Island, Pa.	Universal, Pa.
Colchester, Mich.	New Castle, Pa.	(See Note 3)
Detroit, Mich.	Osborn, Ohio	Wellford, Pa.
Fenton, Mich.	Painesville, Ohio	Wampum, Pa.
Fultonham, Ohio	Quincy, Mich.	West Winfield, Pa.
Ironton, Ohio	Saginaw, Mich.	Wyandotte, Mich.
Kenova, W. Va.	(See Note 1)	

TO

Destinations in

OHIO

Note 1—The rates under this headline also apply from Bay City, Michigan.
Note 2—Where no rates are shown from Toledo to stations named herein, the Silica rates as shown to such stations will apply.
Note 3—The rates under this headline also apply from Bessemer, Pennsylvania.

* Indicates freight charges must be prepaid in accordance with tariffs lawfully on file with the Interstate Commerce Commission and the Public Utilities Commission of Ohio. Certain destinations bearing this reference are served by more than one railroad and it is necessary to ascertain from tariffs whether all railroads serving such destinations require prepayment of freight.

Sta. No.		Bay Bridge	Buffalo	Bellingtoi	Castalia	Cement City	Cleveland	Coldwater	Detroit	Fenton	Fishermans	Ironton	Kenova	Kenmoredale	Limedale	Marblem
(1)	Ada	9.5	15.5	13.5	9	11	11.5	11.5	11	12	11.5	13	13	15	13	16
(2)	*Adams Mills	11	15	16	11	13.5	10.5	14	13	14	7.5	12.5	12	15.5	14.5	13.5
(3)	Addyston		(Cincinnati Rates Apply)													
(4)	Adena	12	14.5	17	11.5	14.5	10.5	15	14	15	10.5	14	14	17	16	12
(5)	*Adrian	8	15	14	8	10.5	10.5	11	10.5	11.5	11	13	13	15	13.5	15.5
(6)	*Afton	14	17.5	15.5	14	14	14	..	15	15.5	12.5	10.5	10.5	12.5	12.5	15.5
(7)	*Agosta	8.5	15	14	9	11.5	11	12	11	12	10.5	12	12.5	15	13.5	15
(8)	Akron	9	13	16	9.5	12.5	7.5	13	12	13.5	10.5	14	14	16.5	15.5	13.5
(9)	*Akron Water Works Switch.	10.5	13	16.5	11	12.5	8	14	13.5	14.5	11.5	14.5	14.5	17	16	..
(10)	Albany	13	16.5	17	13	15	13,	16.5	15	15.5	8.5	8.5	9.5	15.5	15.5	13
(11)	*Alexandersv	8.5	13	16	9.5	13	7	12.5	12	13.5	11	14.5	14.5	16.5	15.5	14
(12)	Alexandria	10.5	15.5	15.5	10.5	13.5	11	13.5	12.5	13.5	8.5	11.5	12	15	14	14
(13)	*Alexis	8	15	13.5	8	8.5	10.5	9.5	8	9.5	12.5	14	14	16	14.5	16
(14)	Alger	9.5	15.5	13.5	9	11	11.5	11.5	11	12	11.5	13	13	15	13	16
(15)	*Allen	13.5	17	17	13.5	15	14	..	15	15.5	9.5	9.5	9	15	15	13
(16)	*Allendale	13	17.5	15	13	13.5	13.5	15	14.5	14.5	12	11	11.5	12	12	15.5
(17)	Alliance	10.5	13	16.5	11	13.5	8	14	13	14.5	10.5	14.5	14	17	16	13
(18)	*Alpha	12	16.5	14.5	11.5	13.5	13.5	13.5	12	14	10.5	11.5	11.5	13	11.5	15
(19)	*Alta	9	15	15.5	9.5	12	10.5	12.5	12	13.5	9.5	12.5	12.5	15.5	15	14.5
(20)	Alvada	8	15	14	8	10.5	10.5	11	10.5	11.5	11	13	13	15	13.5	16
(21)	Alvordton	9.5	15.5	12.5	10.5	7.5	11.5	9	9.5	10.5	13.5	15	15	15.5	13	16.5
(22)	Amanda	11.5	16	15.5	11.5	13.5	12	14	13	14.5	8.5	10.5	11	14.5	14	13.5
(23)	*Amboy	11	16.5	16.5	11	13.5	8.5	14.5	13	14.5	13	15.5	15.5	17.5	16.5	14.5
(24)	*Amesville	13.5	22.5	23	13	15	..	..	..	..	8	11	11	16.5	15	..
(25)	Amherst	7.5	13	16	7.5	11.5	7.5	12	11.5	12.5	11.5	14	14	16.5	15	15

Middle Branch	Mitchell	Neville Island	New Castle	Osborn	Palmerville	Quincy	Saginaw	Silica	Speedo	Superior	Toledo	Universal	Walford	Wampum	W. Winfield	Wyandotte	Sta. No.
12	14.5	14	12.5	9	12	11.5	12.5	9	14	12	9	14.5	13.5	13.5	15	16.5	(1)
9	15	11	11.5	11	11.5	12.5	15.5	12	15	11.5	..	11.5	11	11	12	13	(2)
																	(3)
9	16.5	9.5	16.5	12.5	11.5	15	16	12.5	16.5	13.5	..	9	16.5	16.5	16.5	13.5	(4)
11	15	13.5	12.5	9.5	11	11	12.5	9.5	14.5	13	8	13.5	12.5	12.5	14	9.5	(5)
15	11.5	15.5	16	16.5	15	..	17	14	11.5	16.5	12.5	16	15.5	15.5	16.5	14.5	(6)
11.5	14	14	12.5	9	11.5	12	14.5	9.5	14	12	9	14	12.5	13	14.5	11	(7)
7	16	16.5	9	12	9.5	13	15	11	16	..	16.5	11	9.5	9	11	12	(8)
..	16.5	16.5	9.5	13	9.5	14	16.5	11.5	16.5	14	..	11	9.5	9.5	..	13	(9)
12	15	13.5	13.5	12	13.5	15.5	16.5	14	15	9.5	..	13.5	13.5	13.5	14.5	14.5	(10)
9	16	11	9.5	12	8	12.5	15	16.5	16.5	14.5	16.5	11.5	9	9.5	11.5	11.5	(11)
16.5	14.5	12.5	12	9.5	12	13	15	11	14.5	12	11	12.5	12	12	13.5	13	(12)
11.5	15	14	13	11.5	11.5	9.5	11.5	9.5	15	14.5	9.5	14.5	13	13.5	15	7.5	(13)
12	14	14	13.5	9	12	11.5	13.5	9	14	13	9	14.5	13.5	13.5	15	16.5	(14)
12.5	15	14	14.5	11.5	14.5	..	16.5	14	15	9	..	14	14.5	14	15	14.5	(15)
14	11.5	15	15	9.5	14.5	14.5	16	13	11.5	12	12.5	15	15	15	16	14.5	(16)
7.5	16.5	9	9.5	13	9	14	16.5	12	16.5	14	..	9.5	8	8	11	13	(17)
12.5	13.5	14	14.5	7.5	13.5	14	15	13	13.5	11.5	11.5	14.5	14	14	15	13.5	(18)
9.5	15.5	13.5	12	11	11	13.5	13.5	11	15.5	13	11	13	11.5	11.5	14	11.5	(19)
11	14.5	13.5	13.5	10.5	11	10.5	13.5	9.5	14.5	13	8	13.5	13.5	13.5	14	9.5	(20)
13.5	15	15	14.5	13	13.5	9	11.5	8	14.5	15	8.5	15	13.5	14.5	15.5	9	(21)
11.5	14	13	13.5	9.5	13	13.5	15.5	13	14	9.5	17.5	13	13	13.5	14	13	(22)
10.5	17.5	11	9.5	14	7.5	14	15.5	13	17.5	15.5	..	11.5	9	9.5	11	13	(23)
...	15.5	13	13	11.5	13	..	..	13.5	15.5	16.5	...	13	13	13	14.5	99.5	(24)
9.5	16	13	11	11.5	8.5	12	14.5	9.5	16	14.5	9	13	16.5	11	13	11	(25)

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as the rate information subsequently supplied by the Institute."[7] Respondents accept that Finding.

In the compilation of books the Institute practice, with a few exceptions, is to publish a separate book for each state. The book of latest date published by the Institute and introduced in evidence, except a book for Texas, is "Ohio Rate Book No. 3".[8] It shows rates from 32 shipping points, known as headline points, 11 of them in Ohio, one in New York, 4 in Indiana, 7 in Michigan, 2 in West Virginia, one in Kentucky, and 6 in Pennsylvania, to 1827 destinations, alphabetically listed, in Ohio, except where no rates applicable to cement are published in the tariffs.

A copy of the first, second and third pages of this book appears on pages 998-1000.

B. Rate Books Prior to Cement Institute Books.

Alpha compiled its own books initially in 1910 and distributed them only within its own organization. About a year later, however, some small competitors asked for copies and, inasmuch as the rates shown in these books were merely reproductions of rates appearing in official tariffs, Alpha granted the requests and supplied copies of its books on the basis of printing cost. Somewhat later, Alpha received requests from state officials and dealer customers for copies of its books and supplied them without charge.[1] Coogan testified that Alpha never undertook a general rate service and that there was never any understanding that companies taking the Alpha books were committed to use them.[2]

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[7] Fdgs., Par. 8(b).

[8] Com. Ex. 1110 W.

[1] Coogan, Vice President, Alpha (R) Tr. 23260-63, 24602.

[2] Id., Tr. 24602, 24613, 24615-16, 24627-31.

Apgar, Traffic Manager of Alpha, wrote on February 25, 1916 in response to a letter from the Securities Cement and Lime Company at Hagerstown, Md., as follows:

[Italicised part quoted in Fdgs. Par. Eight (d)]

> ["*Replying to your favor of February 24th, would advise that it is the general understanding that the Cement Companies will use the books published by us. This is the book which we are using and which we will continue to use.*
>
> *For your information, I might state that the Lehigh Company and ourselves watch the changes and exchange correction notices.*"][3]

Commenting upon this letter, Coogan, Vice President of Alpha, testified:

> "Well, as far as the 1916 is concerned, there was—those books applied only to the northeastern section of the United States, and very few of the Respondents in the present case were involved in it at all; and there was no—regardless of Mr. Apgar's letter—there was certainly no understanding that anybody must or must not use those books."[4]

And again on December 20, 1920, on the occasion of a percentage advance in freight rates, Apgar wrote to the Cement Manufacturers Protective Association, as follows:

> "Yours of Dec. 17th. We know that there will be some difference between 40% of the actual rate per ton reduced to barrels as against 40% of barrel rate in our Freight Rate Book, but it was decided that regardless of the fact that the per ton rate increased 40% and reduced to barrels would be different than 40% of the book rate; the book rate increased 40% was to be used in all cases until such time as new freight rate books were compiled at the actual tariff rate per ton reduced to the equivalent

[3] Com. Ex. 3199.

[4] (R) Tr. 24629.

in cents per bbl. Therefore, the book rate should be increased in accordance with the supplement issued and such rates used for figuring purposes.

We figure that on freight rates of 75¢ per bbl., the increase of 40% would be 30¢ per bbl., which would make the rate to be used at present $1.05 per bbl."[5]

At a meeting of the Cement Manufacturers Protective Association on January 31, 1916, the question of freight rate information was under consideration and the following statements appear in the discussion:

"'The President: We have asked Mr. Coogan, who is very closely in touch with the different changes, to advise this office at once, and as soon as he has advised us, we will advise you as promptly as we can, I presume 24 hours after we get the information it will be in your hands, of any changes in freight.

Mr. Coogan: We have felt until the Association gets in working order that we had better continue notifying everybody for say another month, at least, and by that time things here will be in such shape as to handle it from this office. So until then, gentlemen, we will continue to notify you of all changes. In connection with those freight rate books we believe that with the corrections that we have made on them that at the present time they are correct. I guess practically all of the companies are using that book as a basis and it seems [fol. 839] to me that if any company notices any difference from what is shown in those books there that the secretary of the Association, or for the present if you want to do that, notify us at once if there is any error, we are sure we have a correct list of the freight rates as they are.

Mr. Swett: It is further understood that the member companies use these association freight rates until they are notified of the change in the

[5] Com. Ex. 3199.

rates by our secretary regardless from what source they secure information as to a change in rate, or from Mr. Coogan.' "[6]

Alpha continued to use and service its books until the Cement Manufacturers Protective Association began to compile freight rate information in book form about 1915.[7] Its books were furnished until 1922 when the association went out of existence.[8] Between 1922 and 1924 there were no books published by any central traffic bureau in the East.[9]

In the Kansas City area there appeared to have been three organizations during the period from 1915 to 1933 that prepared and distributed rate books.[10] The record is not entirely clear on this point.[11]

In the Michigan area a freight rate bureau was operated by Mr. J. C. Graham from about 1923 to 1930.[12]

After 1924 freight rate books were published for a small portion of the industry by the Nazareth Traffic Bureau.[13] This bureau was a co-operative enterprise by single plant companies such as Phoenix, Dexter, Penn-Allen, Pennsyl-

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[6] Com. Ex. 3191 B.

[7] Coogan, Vice President, Alpha (R) Tr. 23263-64.

[8] Id., Tr. 23263-64, 24610-11.

[9] Id., Tr. 24610-11.

[10] Coogan, *supra*, Tr. 23267-68.
Com. Exs. 988 G-H, 2460.

[11] Coogan, *supra*, Tr. 23267-68.
Moore, R. W., Vice President, Dewey (R) Tr. 47383-84.
Glover, Traffic Manager, Iola Cement Mills—Traffic Ass'n (C) Tr. 14465-67.
Bowen, Vice President, Lehigh (R) Tr. 26997.
McClain, Manager, Kansas City Division (C) Tr. 14407.

[12] Lucas, Vice President, Petoskey (R) Tr. 38811-12, 38708.

[13] Coogan, *supra*, Tr. 23264, 24610-11.

vania, Hercules and Nazareth[14] to supply this service for single plant companies in the Lehigh Valley.[15] The cost of compiling and distributing the books was shared by the members of the Bureau and the territory covered by the service included the New England States, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, West Virginia, and the District of Columbia. During the period that this service operated the larger companies in this area, such as Lehigh, Atlas and Alpha, had books of their own.[16]

In 1929 the National Traffic Bureau, a commercial organization, was founded with headquarters in Washington, D. C.[17] It succeeded in securing subscriptions from approximately two-thirds of the companies, including Atlas, Alpha, Penn-Dixie, Lone Star, Lehigh and the Cowham Group, and it was probably the first traffic bureau to be organized on so large a scale.[18]

On November 6, 1929, the Traffic Manager of Cowham Engineering Company wrote to the company's traffic manager at Chattanooga in response to a letter concerning an invoice for rate book service from this Bureau in which he said in part:

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[14] Coogan, Vice President, Alpha (R) Tr. 23264.
Robeson, Vice President Nazareth (C) Tr. 4028.

[15] Reiter, General Manager, The Institute (C). Tr. 16875.
Alpha: Coogan, *supra*, Tr. 24613.
Hercules: Brobston, President (R) Tr. 26170-72.
Lawrence: Ackerman, Vice President (R) Tr. 31272-73.
Nazareth: Robeson, Vice President (C) Tr. 4027; (R) 28397-98.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38157.
Whitehall: Elliott, Vice President (R) Tr. 28528, 28689-90.

[16] Brobston, *supra*, Tr. 26170-72.

[17] Reiter, *supra*, Tr. 16843-44.
Coogan, *supra*, Tr. 23264.

[18] Com. Ex. 988 A-B.

[Italicised part quoted in Fdgs. Par. Eight (b)]

"* * * One of the principal features of this service is that our principal competitors will be using the same rate books as we are, resulting in uniformity. * * *

[*As to the cost, we considered that it was quite reasonable for the reason that if we did not take the service we would have to compile our own rate books, involving additional clerical help and the cost of printing the rate books and supplements. This service cannot be compared with the old plan that was used in furnishing our company with rate books when the general revision of cement rate books took effect on April 14, 1928. Due to the fact that it would have been impossible for each company to have compiled all rate books needed between the time that the tariffs were published by the railroad and the effective date, we entered into an arrangement with the other cement companies which provided that each company would compile one or more rate books and bill each company only for the cost of printing, it being thought that the cost of compiling or clerical help furnished by one company would practically offset this cost for all companies. This arrangement was only temporary and is to remain in effect only until such time as the National Freight Rate Bureau can finish compiling all rate books needed in the South.*"][19]

At a meeting of the Institute December 13, 1929, the usefulness of this bureau was discussed and, "Mr. MacFarland was asked to take up with Mr. Walter Young, the head of this Bureau, the various rate situations in which members of the Cement Institute were interested."[20] MacFarland testified that it was his recollection that he did not act on this request because from his railroad experi-

[19] Com. Ex. 988 A.

[20] Com. Ex. 136 W.

ence he was certain that Young could not do the work he proposed to do for the price he was asking.[21]

This Bureau failed completely to attain its objectives. It never succeeded in publishing all of the books which it had undertaken to publish,[22] it never issued, or it delayed the issue of correction sheets and supplements to the books it did publish,[23] it failed to include in the books actually published rates from all so-called headline points,[24] and in general, it was operated in an extremely inefficient manner.[25] This breakdown led The Cement Institute to provide the needed service.[26]

C. Organization and Outline of the Institute's Freight Rate Service.

At the time the Institute was organized the National Traffic Bureau was supplying rate service to the industry and for this reason the organizing committee made no provision for the freight rate service in the Articles of Association.[1] That bureau failed to render adequate service and as a result the trustees, in March, 1930, directed the president to take steps to establish a rate information serv-

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[21] MacFarland, Vice President, Medusa (R) Tr. 30951-53.

[22] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38157, 38159.
Com. Ex. 988 C-F.

[23] Reiter, General Manager, Cement Institute (C) Tr. 17125.
Browder, *supra* (R) Tr. 38157-59, 38595.

[24] Com. Ex. 988 C-F.

[25] Reiter, *supra*, Tr. 17125-26.
Coogan, Vice President, Alpha (R) Tr. 23266.
Scott, H. M., President, Keystone (R) Tr. 27481.
MacFarland, *supra*, Tr. 30949-53.

[26] Com. Ex. 136 SS: Minutes of Trustees' Meeting, 3/14/30.

[1] Reiter, *supra*, Tr. 16843-44.
Com. Ex. 136 A-F: Organization Meeting 8/13/29.

ice, and to carry on such activities in a manner satisfactory to the cement industry.[2] The president appointed a committee[3] and requested its chairman to call a meeting for March 25th to consider a report to be drafted in the interim. The chairman set forth his own views in a memorandum[4] covering *inter alia* the following points:

> "(a) Rate information service to embrace all territory east of a line running north and south through the States of Montana, Wyoming, Colorado and New Mexico.
>
> (b) Service to be organized under the supervision of one central bureau or territorial bureaus.
>
> 1. Central bureau would be disadvantageous because of remoteness from many companies depending on the service; because of impossibility of central bureau to keep posted on conditions local to remote territories; and because of amount of office space necessary.
>
> 2. Territorial bureaus would be advantageous because they would be familiar with local conditions; would be close to greatest number of users; would be able simultaneously to print and distribute books for which each was responsible and thus multiply number of states that could be covered in a given period of time; would be able to reach users in remote sections more promptly than central bureau could; would be more accessible to original sources of rate information; and would be able to publiish supplements and have

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[2] Com. Ex. 136 SS: Trustees' Minutes 3/14/30.

[3] E. S. Gubernator of Lehigh, Chairman; H. C. Carpenter of Penn-Dixie; C. N. Apgar of Alpha; F. C. Taylor of Lone Star, and later D. S. Browder of Alpha and C. R. McCary of Hercules were added.
Com. Ex. 1139 B.
Gubernator, Traffic Manager, Lehigh (C) Tr. 7072-74, 7110-11.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38560-61.

[4] Com. Ex. 1139 B-E.

them in the hands of users much more quickly than a central bureau could.

(c) The division of territory should be along traffic lines and consideration in locating the offices should be given to the location of company selling offices, location of general offices of railroads serving the respective territories and the location of the railroads' general committee."

The committee met and after discussion of alternatives, adopted the plan outlined by the chairman.[5]

On April 8, 1930 and before members had notice of definite decision by the president's committee, the Chicago Division, together with representatives of Huron and Oregon,[6] non-members, met and considered the necessity of a freight rate service. After comment upon the failure of the National Traffic Bureau and the full exchange of ideas, it was moved and carried that "Officers of the Institute were instructed to proceed as rapidly as possible to assemble, compile and publish freight rates from producing and shipping points to all destinations in the various States covered by the operations of the Chicago Division of the Institute."[7]

On the following day at Birmingham, Alabama, traffic managers of seven companies,[8] with mills in the southeast, met to discuss the issuance of rate books for their territory pending Institute decision on the matter. It was the consensus of this meeting that the National Traffic Bureau service had become inadequate. Decision was reached to revive an arrangement that had been made in 1928 where-

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[5] Com. Ex. 1139 B-E: Pencilled notations on memorandum of the Chairman's views indicating the committee's adoption.

[6] Com. Ex. 137 C: Minutes Chicago Division 4/8/30.

[7] Com. Ex. 137 E, *supra*.

[8] Com. Ex. 988 C-F: Lone Star, Lehigh, Cowham, Universal Atlas, Penn-Dixie, National, and Alpha.

by each of these companies compiled and distributed to other companies a rate book for some particular state.

Following these meetings decision was made to open an office immediately at Bethlehem, Pa., to be known as "The Cement Institute Freight Rate Bureau" and to maintain offices at Chicago and Kansas City for the compilation and dissemination of freight rate information for those respective areas.

Concerning the plans for the distribution of work in the preparation of these books, Taylor, Traffic Manager of Lone Star, wrote to its subsidiary offices on April 17, 1930, as follows:

[Italicized part quoted in Fdgs. Par. Eight (c)]

"The Cement Institute will establish rate bureaus which should function in the near future. It is contemplated that the bureau established at Bethlehem will handle Trunk Line, New England and southeastern territory. The bureau at Chicago will handle C.F.A. territory, and the bureau at Kansas City Western Trunk Line territory. The bureau at Bethlehem will start immediately to reissue Trunk Line, which will include Virginia and West Virginia and the New England books. The plan for the southeast is that those books will be reissued by those that formerly handled those books; this territory to be taken over by the bureau at Bethlehem soon after they are reissued.

Detail instructions will be issued by Mr. Gubernator, Chairman of the Traffic Committee of the bureau, and roughly speaking, will call for a reissue of the Alabama book by the Lehigh at Birmingham; Florida by the Consolidated at Chicago; Georgia by the Alpha at Birmingham; Mississippi by the Lone Star at Birmingham; South Carolina by the National at Birmingham; North Carolina by the Lehigh, Allentown; Tennessee by the Penn-Dixie at Chattanooga. The Kentucky book will be worked out by the Alpha at Chicago in connection with the bureau at that point."[9]

[9] Com. Ex. 2460.

In terms of Bureau of Mines districts, Bethlehem was to handle Districts #1, 2 and 6; the Chicago office, Districts #3, 4, 5 and 7; and the Kansas City office, District #8.[10] Each Bureau was to be supported by special dues paid by members using the services of the Bureau, because all members did not elect to subscribe and the cost varied in the different areas of the country.[11]

After approval of the proposed service by counsel for the Institute[12] and since this activity was not specifically covered in the Articles of Association,[13] the President submitted it to the vote of members pursuant to Article V, Section 5 of the Articles of Association. The poll of the complete membership showed 37 for, 1 against and 14 not voting. The service was then put in operation.[14]

After the general setup of the service had been decided, the Board of Trustees had nothing further to do with it. All actions with respect to the formation of the rate service and its subsequent activities were governed by the decision of the Supreme Court in the *Cement* case.[15]

Since its inception the Institute's freight rate service has never been suspended.[16]

1. Chicago Bureau

The task of compiling rate books for the Chicago area was already under way before the vote of the Institute

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[10] Reiter, General Manager, The Institute (C) Tr. 16845-46.

[11] Reiter, *supra*, Tr. 4039-40.

[12] Com. Ex. 137 E: Minutes Chicago Division 1/8/30.

[13] Com. Ex. 138 B-M.
Com. Ex. 988 G-H: B. S. Smith to members 4/19/30.

[14] Com. Ex. 136 VV-WW: Trustees' Minutes 5/26/30.

[15] MacFarland, Vice President, Medusa (R) Tr. 31076-80.

[16] Reiter, *supra*, Tr. 16853.

members on the proposal was taken.[1] The work was in charge of G. H. Reiter, then Manager of the Chicago Division.[2] The first Kentucky rate book may have been compiled by traffic experts in the Chicago office of Alpha.[3] The Bureau first issued two compilations for each state in the Chicago Division designated as Book No. 1 and Book No. 1-A.[4] The original Book No. 1 for each state was prepared by comparing books of individual member companies and contained rates for the maximum number of headline points that were contained in each one member's books. By July 22, 1930 the Chicago Bureau had issued twelve rate books covering eleven states.[5]

The Chicago Division Office was closed in July, 1932 and the Rate Bureau removed to New York City, from whence it continued to service the rate books issued in 1930 for states in the Chicago and Kansas City Divisions.[6]

With the advent of NRA the Chicago Division Office was reopened August 1, 1933 and the rate bureau returned to Chicago, under supervision of the manager of that Division. Upon reopening the Chicago office it was proposed to reissue all books for that area and the manager of the Chicago Bureau solicited traffic managers of all companies shipping into Chicago territory for opinions as to the most convenient setup for the new books.[7]

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[1] Com. Ex. 988 G-H: B. S. Smith to Members 4/19/30.

[2] (C) Tr. 4008-09.

[3] Com. Ex. 2460: Letter dated 4/17/30, Taylor, Lone Star to Traffic Managers.
Com. Ex. 988 G-H: *Supra.*

[4] Resp. Exs. 156, 157: Indiana Rate Books.
Com. Exs. 3042-3044: Ohio, Illinois, Iowa Rate Books.

[5] Com. Ex. 137 R-V: Reiter's Report 7/22/30.

[6] Reiter, Former Secretary, The Institute (R) Tr. 16729-30.
Resp. Ex. 126: Reiter's Report to Chicago Division 1/11/34.

[7] Com. Ex. 896 A-B: Reiter to Traffic Manager 8/26/33; Davidson Coke & Iron to Reiter 8/29/33.

On the basis of suggestions received, the former two-book method used in this area was abandoned and all rates for a particular state were incorporated in one book.[8] The Chicago Bureau continued to service the Kansas City area books.[9] The Chicago Bureau thereafter remained in Chicago, but after September, 1936, it was under the supervision of the General Manager of the Institute.[10]

2. The Bethlehem Bureau

The Institute set up a rate bureau at Bethlehem, Pa. in charge of C. H. Reigart, former manager of the Nazareth Traffic Bureau, for publication of books for the northeastern and southeastern states,[1] under the supervision of the Cement Rate Committee heretofore mentioned. So far as the northeast was concerned, the manner in which the books were compiled and issued is not clear. Reiter testified that temporarily in order to issue codes as promptly as possible, compilations for the various states in the northeast were parceled out among various companies for preparation.[2] The traffic manager of Lone Star describing the proposed service to his district traffic managers stated that the Bethlehem Bureau would reissue books for states in trunk line territory.[3] This territory includes New York, New Jersey, Delaware, Maryland, the District of Columbia and practically all of Pennsylvania, Virginia and West

[8] Resp. Ex. 126: Reiter's Report to Chicago Division 1/11/34.
Com. Ex. 549 Y: Reiter to Hufford 11/29/33.

[9] Resp. Ex. 126, *supra*.
Com. Ex. 896 B, *supra*.

[10] Com. Ex. 127: Reiter's Report to Board of Trustees, 12/10/36.

[1] Com. Ex. 988 G-H: B. S. Smith to Members, 4/19/30.
Com. Ex. 2460: Letter dated 4/17/30, Taylor, Lone Star to Traffic Managers.

[2] Reiter, General Manager, The Institute (C) Tr. 4009-10.

[3] Com. Ex. 2460, *supra*.

Virginia.[4] What were reissues of existing books does not appear, but the states covered were ones theretofore covered by The Nazareth Traffic Bureau.[5] In any event the record indicates that the rate committee was active in preparation of books covering the northeastern states.[6]

D. S. Browder, Alpha's traffic manager at Birmingham, sub-chairman of the Rate Committee for the southeast, took charge of the compilation of rate books for the southeastern states.[7] In accordance with the meeting of April 9, 1930 of the southeastern companies[8] the preparation of compilations was parcelled to various companies in accordance with the practice utilized at the time of the general rate revision in 1928. As the work got under way some changes were made in the assignments. Duplication was discovered with the work of the Kansas City Bureau, but the distribution of work followed the effort to secure publication of the books as speedily as possible.[9]

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[4] Resp. Ex. 2896: Map of Freight Rate Association territories.

[5] Nazareth Traffic Bureau Books for New York and New Jersey, Com. Ex. 2849; for Pennsylvania, Resp. Ex. 1092; for Maryland, Delaware, Virginia, West Virginia and District of Columbia, Resp. Ex. 1093; for New England, Resp. Ex. 1354; all effective 7/1/27.

[6] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38160.
Com. Ex. 1139-2 F, 2 M, 2 N-2 Q, 4 E-4 I: Correspondence concerning freight rate books.

[7] Browder, *supra*, Tr. 38160-61.

[8] Com. Ex. 988 C-F: Letter dated 4/9/30, Browder of Alpha to Traffic Representatives.

[9] Id.
Com. Ex. 988 G-H: B. S. Smith to Members 4/19/30.
Com. Ex. 2460: Letter dated 4/17/30, Taylor, Lone Star to Traffic Managers.
Com. Ex. 1139 Y, Z, 2 A-2 C: Correspondence concerning freight rate books.
Reiter, General Manager, The Institute (C) Tr. 4009-10.

Each company responsible for a book in the southeastern territory checked the rates for its particular book. Thereupon the work sheets were turned over to Browder as sub-chairman of the Rate Commission and he in turn had the books printed in the name of the Institute. The Institute thereafter looked after corrections and revisions.[10] All books issued for the territory had been checked by an experienced traffic man with respect to accuracy and conformity with the tariffs.[11]

In understanding southern rates it is important not to confuse *southern railway basing points* established by the railroads which determine all freight rates for a number of points within a radius of approximately 12 miles of the freight rate basing point with so-called basing points in the cement industry.[12]

Gubernator testified that the activities of the Rate Committee, of which he was chairman, came to an end sometime in August, 1930.[13]

The Bethlehem Bureau has continued to function uninterrupted at any time during the life of the Institute.[14] During the period from May 12, 1931 to N.R.A. in 1933, the rate service was the only activity continuously conducted by the Institute.[15]

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[10] Browder, Traffic Manager, Penn-Dixie (C) Tr. 38160-61.

[11] Id., Tr. 38160.

[12] Com. Ex. 1139-2 V: Letter 7/18/30, Gubernator, Traffic Manager, Lehigh to Browder, *supra*.
Resp. Ex. 2901: Letter 7/2/30, Browder reply to Gubernator.
Browder, *supra*, Tr. 38164-65.

[13] Gubernator, Traffic Manager, Lehigh (C) Tr. 7110-11.

[14] Reiter, Secretary of The Institute (C) Tr. 4008-09.
Resp. Ex. 127: Reiter's Report 12/10/36.

[15] Reiter, *supra*, Tr. 16853.
MacFarland, Vice President, Medusa (R) Tr. 30870-71, 30943.
Com. Ex. 136-3 K, 3 L: Trustees' Meeting 5/12/31.

3. Kansas City Area

The record is not clear as to the exact procedure followed in compiling books originally in the Kansas City area. It appears, however, that at the time the decision to undertake an Institute service was made, there was already a freight rate service in existence in the Kansas City area, although it is not clear as to the states covered by it.[1] In soliciting the vote of members on the freight rate service, the President of the Institute stated that the existing Kansas City service would be amplified as necessary and coordinated with the other rate bureaus. He also stated that some division of the work covering the Mississippi Valley territory would be made between the Chicago and Kansas City offices as a matter of speed and convenience.[2] Chicago Division territory, as defined by the Institute, included all of Ohio, Indiana, Michigan, Illinois, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota and western Pennsylvania, and West Virginia, and eastern Missouri. Kansas City Division territory included all of Nebraska, Kansas, Arkansas, Oklahoma and Texas, and the western parts of Louisiana and Missouri.[3] The Chicago Bureau however undertook publication from the outset of books for the State of Missouri.[4] No book at all was published for the State of Texas until 1934.[5] The evidence

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[1] McClain, Manager Kansas City Division (C) Tr. 14407-08.
Com. Ex. 988 G-H: B. S. Smith to Members 4/19/30.
Com. Ex. 2460: Letter 4/17/30, Taylor, Lone Star to Traffic Managers.

[2] Com. Ex. 988 G-H, *supra*.

[3] Com. Ex. 136 AA-PP: Trustees' Meeting 1/24/30.

[4] Com. Ex. 137 R-V: Reiter Report to Chicago Advisory Committee 7/22/30.

[5] Reiter, General Manager, The Institute (C) Tr. 16852-53.
Resp. Ex. 126 C: Reiter, report to Members 11/1/34.

indicates, although not clearly, that the Kansas City bureau actually compiled and published books for the State of Nebraska, Oklahoma, Kansas and Arkansas;[6] that after the Bureau there had begun functioning, the Missouri rate book which had been compiled by the Chicago Bureau, was turned over to the Kansas City Bureau for supplementary servicing in order to prevent duplication by the Chicago Bureau;[7] and that the Kansas City rate service continued to function at least as late as November, 1930.[8] There is no indication in the record of the method used in compiling books issued by the Kansas City Bureau. Shortly after the service was inaugurated in the Kansas City area that division office was closed[9] and the work of servicing Kansas City books was taken over by the Chicago Bureau.[10]

It was reported at the Trustees' meeting on September 4, 1930 that books for all states east of the Rockies except Texas and Louisiana had been issued.[11]

4. Texas and New Mexico Books

Publication of a book for Texas was undertaken toward the end of 1934 after service had been approved by members of that district.[1]

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[6] Com. Ex. 2460: Taylor to Lone Star Traffic Managers 4/17/30 re Arkansas book.

[7] Com. Ex. 137 R-V: Reiter report to Chicago Advisory Committee 7/22/30.

[8] Resp. Ex. 143 A-D: McConnell report to members 11/1/30.

[9] McClain, Manager Kansas City Division (C) Tr. 14399.

[10] Com. Ex. 136-3 L: Trustees' meeting 5/12/31.

[11] Com. Ex. 136-2 Y-3 D: Trustees' minutes.

[1] Resp. Ex. 126 C: Reiter to Chicago Members 11/1/34.
Com. Ex. 2417: Neylan to Ferguson 10/4/34.

In this connection, Cox, Vice President of Republic, a non-respondent, wrote to Baumberger, the Trustee of District No. 9 on October 10, 1934:

> "We are in receipt of a letter from Mr. G. H. Reiter, Manager Chicago Division of the Cement Institute, relative to the Texas Rate Book No. 1 and rate book service from the Institute. He asked that we advise you if we are willing to assist in defraying the cost of this book as set forth in his letter.
>
> It is our recollection that at the Institute meeting in Kansas City last spring, when the matter of rate book for Texas was discussed, the decision was to have these books issued by the Chicago Division and they were to be used exclusively by all members for rate and price determination purposes. Based on these two conditions we were agreeable to participating in the cost of preparing these rate books.
>
> It has come to our attention that at least one Cement Company in Texas is not using Rate Book No. 1, in accordance with the purposes outlined at the Kansas City meeting. However, inasmuch as we have secured a number of copies of this book, this will advise you that we are agreeable to being assessed at the rate of $.00025 per barrel on shipments from our mill for the period beginning June 1, 1934 and ending May 31, 1935. We are not agreeable to further participation or payment of dues beyond May 31, 1935 under present conditions and unless we so signify our willingness in writing prior to that date, we will terminate payment of these dues at that time."[2]

The book for New Mexico, the last additional book issued by the Institute, was published in October, 1935.[3]

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[2] Com. Ex. 2830.

[3] Com. Ex. 1110 T: New Mexico Rate No. 1.
Reiter, General Manager, Institute (C) Tr. 3154-55.

5. Coverage of the Books by States

As of the date of the complaint in this proceeding the two Institute rate bureaus were issuing and servicing rate books covering all states in Bureau of Mines Districts 1 to 9 and the State of New Mexico located in District 10.[1] The Institute provided no rate service in Bureau of Mines Districts 11 and 12 on the Pacific Coast or any part of District 10 except New Mexico because members located in these districts never requested any such service, did not contribute to it and did not receive it.[2] The railroad rate structure on the Pacific Coast is relatively simple, all rates there appearing in one tariff. The necessity of searching through a number of tariffs to find the applicable rates does not exist there.[3]

Thus, Reiter, the General Manager reporting to Conn, Chairman of the Committee on Future Activities of the Institute on July 10, 1936, summarizing the Institute's activities as of that date, said:

> "(a) *Freight Rate Bureaus.* At present two Freight Rate Bureau offices of The Cement Institute issue and service freight rate books for all states in Districts 1 to 9, inclusive, and also for the state of New Mexico in District 10. There seems to be a unanimous sentiment that this work be continued as at present. The principal shipper in District 10 believes that such freight rate schedules may be issued more economically by its own Traffic Department and members of Districts 11 and 12 have a much simplified freight rate problem which they may or may not desire to handle cooperatively."[4]

[1] Com. Ex. 595 A-F: Reiter report to Conn 7/10/36.

[2] Reiter, General Manager, Institute (C) Tr. 3156, 16852-53; Gay, General Manager, Santa Cruz (C) Tr. 8669; Pacific Coast Cement Institute provided no rate service.

[3] Reiter, *supra*, Tr. 3156.
Com. Ex. 595 A-E.

[4] Com. Ex. 595 D-F, *supra*.

D. Contents of the Freight Rate Books.

Commission's Findings, Paragraph Eight (b), state *inter alia*:

> "The cooperative preparation and publication of special freight rate books for use by cement producers was commenced about 1914 by various regional associations which included in their memberships some of the present respondents. The Cement Manufacturers Protective Association, the Southeastern Portland Cement Association, the Kansas City Cement Bureau, and other organizations furnished freight rate information. That furnished by the Cement Manufacturers Protective Association until about 1922 was in much the same form as the rate information subsequently supplied by the Institute."

Respondents accept this.

1. Rates Given

All rates published in Institute books as heretofore stated, have always been derived from official tariffs of railroads on file with the I.C.C. or State regulatory bodies.[1] Since tariffs change from time to time the Institute rate bureaus have always issued supplements to the various books advising members of the tariff changes.[2] The books have always carried the lowest rate applicable to carload lots[3] in effect between the particular points shown and no trouble is caused to users because the books do not so

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[1] Reiter, General Manager, The Institute (C) Tr. 16864; Com. Exs. 994, 1000, 1110 A-EE, 3042, 3043, 3247: Freight Rate Books; Resp. Exs. 156, 157: Freight Rate Books.

[2] Reiter, *supra*, Tr. 16864.

[3] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38565-66. Cole, Traffic Manager, Medusa (R) Tr. 40757.

state.[4] Published rates are rail rates only.[5] No truck or water rates are given because there are no filed rates for such types of transportation.[6] On one occasion the Bethlehem Bureau received from a subscriber information as to a water rate from that subscriber's plant to a point in Louisiana. The Bureau sent this information out in correction sheet form to Louisiana rate book subscribers only. This was an unusual case. The information affected no rate carried in the book.[7]

2. Destination Points

The rate book for each state has always contained all station points listed in the tariffs covering that state with minor exceptions such as a station point which is a siding for a gravel plant or mine.[1] The books also carry information concerning spur tracks.[2] Whenever a station was omitted by error the rate bureaus sent out a supplement covering it.[3] The books show only those stations which received carload freight since only carload rates on cement appear in the tariffs. At the outset a question arose in the southern territory as to the entry of a low rate to a station which did not accept carload shipments or a higher rate by a different railroad to the same station, unrestricted as to its shipments. Gubernator stated the question in a

[4] Cole, Traffic Manager, Medusa (R) Tr. 40757.

[5] Nelson, J. L., Vice President, Wolverine (R) Tr. 36052.
Reiter, General Manager, The Institute (C) Tr. 4109-10.

[6] Reiter, *supra*, Tr. 4109-10.

[7] Com. Ex. 999 A: Lone Star to Reigart, 4/17/36.
Com. Ex. 999 B: Correction sheet #11, La. #3.
Reiter, *supra*, Tr. 4106-08.

[1] Reiter, *supra*, Tr. 4095, 16863-64.

[2] Roberts, Traffic Manager, Volunteer (R) Tr. 31970-71.

[3] Reiter, *supra*, Tr. 4095-96.

letter to McConnell setting forth the rule which had governed the compilation work, as follows:

> "The lowest railroad rate from mill point to destination applicable over routes offering facilities for the delivery of carload freight at destination."[4]

McConnell's reply does not appear, but the published rates were for carload delivery only.[5]

3. Headline Points

Reiter testified that it was never the practice of the Institute to limit publication of rates to those from so-called basing points. It has never been a concern of the Institute as to whether a mill was or was not a basing point.[1] As stated above, headline points have been determined by the points at which shipments of cement originate.[2]

Reiter, reporting to the Advisory Committee Meeting of the Chicago Division on July 22, 1930, wrote:

> "* * * It was the writer's idea that these original books would be for temporary use and that as soon as possible additional books for each state would be prepared and distributed, showing as headline points all probable shipping points into the various states. In discussing this matter with members, however, we found such a divergent opinion that we believe it to be impossible to publish additional books satisfactory to a majority of the members, and in the absence of specific instructions from the Advisory Com-

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[4] Com. Ex. 1139-2 N: Letter dated 7/3/30.

[5] Com. Ex. 994: North Carolina Book #3.
Com. Ex. 1000: Virginia Book #4.
Com. Ex. 1110 A, C, D, O, Y, AA and J: Alabama #3, Florida #3, Georgia #3, Mississippi #3, South Carolina #3, Tennessee #3, and Louisiana #3, respectively.

[1] Reiter, General Manager, The Institute (C) Tr. 16913.

[2] *Supra.*

mittee, or the entire membership, do not now plan to issue additional books. We are, however, entering on office file cards freight rates from additional shipping points as fast as they can be collected and checked.'"[3]

Upon undertaking the revision of the books published by the Chicago Bureau late in 1933 and the decision to consolidate all rates in one book, Reiter compiled a list of headline points proposed for the books for use in District #8 and forwarded it to Alexander, Trustee for District #8, with the request that he send it to members in that district for suggestions as to additions or eliminations.[4] Alexander distributed the list to the member mills in his district and consolidated the suggestions received in a list which he sent to Reiter.[5] In the replies received by Alexander, Universal Atlas stated that it was not interested;[6] Lehigh and Ash Grove of Missouri expressed satisfaction with Reiter's list as it was;[7] and Monarch, Oklahoma, Ash Grove of Nebraska and Lone Star submitted suggestions.[8] Reiter considered the suggestions and incorporated most of them, rejecting them where his investigation showed that there were no rates from some of the points suggested and that from other points no appreciable amount of cement moved into the states under discussion.[9]

Reiter followed the same procedure of consultation as to headline points with the interested companies at the

[3] Com. Ex. 137 U-V.

[4] Resp. Ex. 159 A-B.

[5] Resp. Ex. 158 E: Alexander to companies 12/2/33.
Resp. Ex. 158 A-D: Alexander to Reiter 12/22/33.

[6] Resp. Ex. 158 N.

[7] Resp. Ex. 158 K, O.

[8] Resp. Ex. 158 G-H, L-M, R-S, and T-V.

[9] Reiter, General Manager, The Institute (C) Tr. 16862-63.

time of re-issue of the Ohio book in 1936,[10] and in 1938 preparatory to a general reissue of books, the same procedure was again followed.[11]

The Bethlehem Bureau books did not at first show as headline points all mill points from which any applicable amount of cement moved into the territory covered by the particular book. Evidence was taken on the subject of omissions and subsequent inclusions of rates from certain mill points. As to the reason, if any, of such omissions, the principal one undoubtedly was that their inclusion had not been requested.[12] Moreover rates from some points shown are identical with rates, or a majority of the rates, from mills not carried as headline points.[13] Reiter agreed, however, that unless rates carried were the same the book would be valueless either for shipping or calculating destination prices so far as mills not carried were concerned.[14] Such rates, omitted in the books as originally published, appeared in correction sheets and were continued in subsequent books.[15]

Taylor, Traffic Manager of Lone Star, writing to Gubernator on August 6, 1930 his views on the form of the rate books, said:

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[10] Resp. Ex. 2643 A: Reiter, General Manager, the Institute, to Nelson, Vice President, Wolverine, 8/24/36.
Resp. Ex. 2643 B: Nelson, *supra*, to Reiter, *supra*, 8/25/36.
Resp. Ex. 2643 C: Reiter, *supra*, to Nelson, *supra*, 8/26/36.
Com. Ex. 1110 W: Ohio #3.

[11] Resp. Ex. 91: Ihle to Wecker 3/31/38.

[12] Coogan, Vice President, Alpha (R) Tr. 24624.

[13] Reiter, General Manager, The Institute (C) Tr. 4088-90.

[14] Reiter, *supra*, Tr. 4111-12.

[15] Com. Ex. 1110 K: Book #4 for Maryland, Delaware and District of Columbia.
Com. Ex. 3019: Correction Sheet #1 to 64 thereto.

[Italicized part quoted in Fdgs. Par. Eight (f)]

["*Confining the rate books to certain points of origin, would eliminate a lot of extra information that is of no value, while the master rate sheets, showing the rates from all points of origin, would supplement that information so that each subscriber would have all the rates. The method appears to be more economical and more efficient, however, it does not answer the question as to why you show rates from certain points of origin, and not others. This subject has been discussed a number of times, and one of the reasons for showing all the rates in the rate books is to avoid any appearance of preference.*"][16]

Reiter stated that he believed the headline points in books issued by the Bethlehem Bureau were determined by consulting with members in a manner similar to that used by the Chicago Bureau;[17] but Apgar, Traffic Manager of Alpha stated that he never worked out with other traffic managers headline points for the Bethlehem books.[18] However, Ackerman of Lawrence, located in the eastern territory, stated that his company had had a voice in determining the headline points.[19]

When the Bethlehem Bureau came in Reiter's jurisdiction in 1936, he found the practice there to be substantially the same as in Chicago, although its books varied somewhat with respect to the number of shipping points shown. He gave Reigart the same instructions he had given Blecher at the outset of the Chicago service, *i.e.*, to show as headline points all points of shipment from which any appreciative amount of cement moved into the area covered by the book.[20]

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[16] Com. Ex. 1139-4 H.

[17] Reiter, General Manager, The Institute (C) Tr. 4090-91.

[18] Apgar, Traffic Manager, Alpha (C) Tr. 7048-50.

[19] Ackerman, Vice President, Lawrence (R) Tr. 31273.

[20] Reiter, *supra*, Tr. 4008-09, 4113-14.

In May, 1931, Lundborg, Manager of the Northeastern Division, wrote Reigart for a list of basing points for the purpose of answering an inquiry therefor by I. D. Royal, an investigator from the Federal Trade Commission. Reigart replied that he had no definite knowledge concerning the establishment of basing points and that he was publishing rates from different producing points when requested to do so by the Cement Rate Committee. Lundborg so advised A. H. Tackett, an attorney for the Commission, and suggested that he consult E. S. Gubernator, chairman of the Cement Rate Committee.[21]

The Birmingham Committee of company traffic managers, on April 9, 1930, expressed the opinion that the books should show full lines of rates from all points of origin shown in books distributed by some companies in the southeast.[22] No effort was made to confine the points of origin shown to basing point mills.[23] Browder included all possible points that could ship into the particular state including ports of entry from which the I.C.C. had ordered rates applicable to cement and he gave no consideration at all as to whether or not headline points included were merely locations of Institute members.[24] Southeastern companies were free to suggest and cause the inclusion of their own mills as headline points in any book compiled by Browder's direction. Thus, when Browder received the draft of the North Carolina book prepared in Lehigh's Allentown office and found that it did not carry rates from Ragland, Portland, Rockmart, Knoxville and Cowan, where mills shipping into North Carolina were located, he drew

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[21] Com. Ex. 1172: Letter dated 6/1/31, Lundborg to Tackett.

[22] Com. Ex. 988 C-F: Letter dated 4/9/30, Browder, Traffic Manager, Alpha to Traffic Representatives.

[23] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38161, 38168.

[24] Browder, *supra*, Tr. 38161, 38168-69.

Gubernator's attention to the fact[25] and Gubernator replied:

> "It is the purpose to publish as complete a rate book as possible. If, therefore, the rates from the points named in your letter can be supplied by those interested in their publication in such form as to permit their incorporation in the rate book without delaying too long its publication, it would be our purpose to include them."[26]

They were included.[27]

The trustees at their meeting on May 18, 1937 adopted the recommendations of Reiter for the standardization of books issued and services rendered by the two freight rate bureaus, including the recommendations that they contain:

> "* * * as headline points all points of origin from which any appreciable tonnage of cement moves into the territory covered by the book."[28]

It was customary for shippers wanting information for rates not included in the books to write to the Bureau handling the book for the particular state for which information was desired and the Bureau sent the information and usually included it in the next issue of the book involved[29] or in a correction sheet.[30] Subscribers understood that

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[25] Com. Ex. 1139 T: Letter dated 4/21/30, Browder, Traffic Manager, Alpha to Gubernator, Traffic Manager, Lehigh.

[26] Com. Ex. 1139 U: Letter dated 4/23/30.

[27] Com. Ex. 1139 X: Letter dated 4/25/30, Browder, *supra*, to Gubernator, *supra*.
Com. Ex. 1139-2 C: Letter dated 5/16/30, Browder to Carpenter.

[28] Com. Ex. 628 C: Trustees' Minutes.

[29] Reiter, General Manager, The Institute (C) Tr. 16863.

[30] Com. Ex. 1004 B: Florida to Reigart 12/8/36 requesting Panama City rates to points in Florida, Georgia and Alabama.
Com. Ex. 3009 Y: Correction Sheet No. 25 adding Panama City as headline to Alabama No. 3.

they were free to request rates from additional headline points to be included in reissues of the books,[31] and such requests were granted.[32]

Mill points have been dropped as headline points in certain instances where no appreciable amount of cement any longer moves from them into the state in question or where the headline represented a mill that has been abandoned.[33]

Com. Ex. 3011-2 o: Correction No. 39 adding Panama City to Florida No. 3.

Com. Ex. 3012-2 b: Correction No. 27 adding Panama City to Georgia No. 3.

Com. Ex. 3011-2 L: Correction No. 36 adding Miami to Florida No. 3.

Com. Ex. 415 (574): Griffith to Reigart 2/3/37 requesting rates from Port St. Joe.

Com. Ex. 415 (573): Reigart to Griffith 2/6/37 supplying the rates.

Com. Ex. 3011-3 b: Correction No. 52 adding Port St. Joe as headline to Florida No. 3.

Com. Ex. 998 A, B embraces similar requests for rates from Jacksonville, Florida, the reply and then incorporation in Correction Sheet No. 23 to Alabama book. There are many other instances in evidence in the Correction Sheets of the addition of headline points.

[31] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38168-69.
Brooke, Vice President, Monarch (R) Tr. 42197-98.

[32] Lucas, Vice President, Petoskey (R) Tr. 38709.
Browder, *supra*, Tr. 38168-69.

[33] Reiter, General Manager, The Institute (C) Tr. 16864.
Com. Exs. 3043, 1110 E: Birmingham, Gas Belt & Ironton dropped from Illinois.
Resp. Exs. 156, 157, Com. Ex. 1110 F: Bellevue dropped from Indiana.
Com. Exs. 3044, 1110 G: Buffington and Gilmore City dropped from Iowa.
Com. Exs. 3042, 1110 W: Bellevue and La Salle dropped from Ohio.
Correction notices also dropped headline points.

F. B. Warren, Vice-President in charge of sales of Bessemer, assumed from his experience that headline points in Institute books were basing points.[34] On the other hand the Vice-President of Alpha stated that headline points shown in Institute books are not confined to basing points but show rates from any mill that actively does business in the state covered by the book.[35]

Companies that compile their own books include as headline points all mills with which they come into competition in their respective marketing areas.[36] As new mills enter a particular territory they are added as headline points, and, conversely, mills going out of business are eliminated.[37]

Several Institute rate books carry ports of entry for foreign cement as headline points.[38] Although there are

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[34] Warren, Vice President, Bessemer (R) Tr. 32617-18.

[35] Coogan, Vice President, Alpha (R) Tr. 23268-69.

[36] Moore, R. W., Vice President, Dewey (R) Tr. 46685.
Manley, General Manager, Hawkeye (R) Tr. 41824.
Wecker, President, Marquette (C) Tr. 14034.
Alexander, President, Missouri (R) Tr. 37314, 37358.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36569.
Thompson, Sales Manager, Oklahoma and Arkansas (R) Tr. 46511, 46520.
Hartley, Sales Manager, South Dakota State Cement Plant (C) Tr. 12783.

[37] Moore, *supra*, Tr. 46691.

[38] Freight Rate Books and Correction Sheets that show ports of entry: Alabama No. 3: Com. Ex. 1110 A—Mobile, Ala., Pensacola, Fla.
Com. Ex. 3009 W-X: Jacksonville, Fla.
Com. Ex. 3009 Y, C 2: Panama City, Fla.
Com. Ex. 3009 M 3-N 3: Brunswick, Ga.
Florida No. 3: Com. Ex. 1110 C—Charleston, S. C., Jacksonville, Fla., Pensacola, Fla., Savannah, Ga.
Com. Ex. 3011-2 L-2 N: Miami, Fla.
Com. Ex. 3011-2 o, 2 W: Panama City, Fla.

no mill points at ports such as Jacksonville, Savannah, Panama City, Wilmington and Charleston, they are actually shipping points for foreign cement to points in the interior.[39]

The Bureaus do not, however, publish rates from ports of entry where there are no commodity freight rates on cement from such ports. This is true of New York, Boston and Philadelphia. If there were commodity rates from such points they would be included.[40]

Witnesses for respondents testified that the Institute books contained a greater number of origin points than books published by the Cement Manufacturers' Protective Association,[41] by the Nazareth Traffic Bureau,[42] by individual companies,[43] or by books formerly used.[44]

Com. Ex. 3011-5 B-5 H: Brunswick, Ga.
Com. Ex. 3011-5 I-5 J: West Palm Beach, Fla.
Com. Ex. 3011-5 J: Fort Lauderdale, Fla.
Com. Ex. 3011-5 J-5 K: Mobile, Ala.
Georgia No. 3: Com. Ex. 1110 D—Charleston, S. C., Jacksonville, Fla., Savannah, Ga.
Com. Ex. 3012-2 B, 2 G: Panama City, Fla.
Com. Ex. 3012-2 L-2 N, 4 A-4 D: Brunswick, Ga.
Mississippi No. 3: Com. Ex. 1110 O—Mobile, Ala., Baton Rouge, La., Gulf Port, Miss.
South Carolina No. 3: Com. Ex. 1110 Y—Charleston, S. C., Jacksonville, Fla., Savannah, Ga., Wilmington, N. C.
North Carolina No. 3: Com. Ex. 994—Charleston, S. C., Washington, N. C., Wilmington, N. C.
Virginia No. 4: Com. Ex. 1078: Wilmington, N. C.

[39] Reiter, General Manager, The Institute (C) Tr. 4104-05, 4124-26.

[40] Reiter, *supra*, Tr. 4126.

[41] Bowen, Vice President, Lehigh (R) Tr. 26996.

[42] Brobston, President, Hercules (R) Tr. 26172.

[43] Coogan, Vice President, Alpha (R) Tr. 23235-36.

[44] Ackerman, Vice President, Lawrence (R) Tr. 31273.

4. Conversion Tables and Handling of Fractions

As heretofore stated cement is sold by the barrel consisting of 376 pounds and usually shipped in four sacks weighing about 1 pound a piece and each containing 94 pounds of cement. The total barrel weight of the 4 sacks is 380 pounds. Rail rates are stated in the tariffs as cents per cwt. The freight cost of the barrel is, therefore, the rate multiplied by 3.8 and by 3.76 for bulk cement.

A conversion table is a table showing cents per cwt. listed in numerical order in one column and in a second column their multiples by 3.8. Thus the cost of freight per barrel appears opposite the rate per cwt.

At the outset of the Institute rate service books published by all rate bureaus contained conversion tables[1] for the convenience of users in converting the rates shown in the books from cents per cwt. to cents per barrel.[2]

In connection with the conversion tables published in the original books it was therein explained that decimals had not been carried out more than two places and that fractions of less than ½ a cent had been dropped and those of ½ or over had been carried to the next full cent.[3] For

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[1] Com. Ex. 1139 R-S: Apgar, Traffic Manager, Alpha to Browder, Traffic Manager, Penn-Dixie 4/22/30.
Com. Ex. 3043: Illinois Book #1A.
Resp. Ex. 156: Indiana Book #1.

[2] Reiter, General Manager, The Institute (C) Tr. 4041, 16875-76, 16880-82.
Institute Rate Books in Evidence showing conversion tables: Resp. Ex. 156, Com. Exs. 994, 3043, 1000 and 1110 A, C, D, J, K, O, R, S, U, X, Y, AA, EE.
Institute books in evidence not showing conversion tables: Resp. Ex. 157, Com. Exs. 3044, 3042, 3247, and 1110 B, E, F, G, H, I, L, M, N, P, Q, T, V, W, Z, BB, CC and DD.

[3] Com. Ex. 1139 R-S; Com. Ex. 3043; Resp. Ex. 156: Freight Rate Books.

the original books issued in Chicago, Reiter copied, as to form conversion tables used from previous company publications.[4]

The Chicago Rate Bureau did not include conversion tables in its books issued after 1933.[5] The Institute's attorneys had criticized the disposition of fractions in the conversion tables contained in the early Chicago books,[6] and Reiter dropped the tables from the revised books. Asked why he did so, he testified:

> "Well, I did that, Mr. Wooden, on my own initiative.
>
> It was my opinion that the conversion table then appearing in the freight rate books issued by the Cement Institute was unnecessarily long and complicated and I knew that some cement companies, at least, had conversion tables of their own which they used, and which were much simpler than the conversion table in the Cement Institute books, and, therefore, I saw no use in continuing it and discontinued it.'"[7]

Books published by the Bethlehem Bureau, however, continued to carry conversion tables and they are to be found in all Bethlehem books in use as of the date of the complaint in this proceeding.[8] The Trustees at their meeting on May 18, 1937, considered Reiter's recommendations for the standardization of the books of both bureaus. These

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[4] Reiter, General Manager, The Institute (C) Tr. 16880.

[5] Reiter, *supra*, (C) Tr. 16882.
Com. Exs. 1110 B, E, F, G, H, I, L, M, N, P, Q, T, V, W, Z, BB, CC, DD, 3247: Freight Rate Books.

[6] Com. Ex. 549 Y: Reiter, *supra*, to Hufford, Traffic Manager, West Penn 11/29/33.
Com. Ex. 933-7 R: Reiter, *supra*, to Members 2/21/34.

[7] (C) Tr. 17136.

[8] Com. Exs. 994, 1000, 1110 A, C, D, J, K, O, R, S, U, X, Y, AA, EE.

recommendations included the omission of conversion tables from all Institute books. The Trustees adopted this recommendation.[9]

The use of conversion tables was not an innovation. Some companies have had and used conversion tables for many years,[10] and tables were likewise used by companies that went out of existence long before the Institute came into being.[11] Books formerly published by the Nazareth Traffic Bureau contained similar tables.[12]

DISPOSITION OF FRACTIONS

The method of disposing of fractions was not inaugurated by the Institute. It has been company practice long prior to the existence of the Institute to convert rates and

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[9] Com. Ex. 628 C: Trustees' Minutes.

[10] Dewey: Moore, R. W., Vice President (R) Tr. 46708-10.
Resp. Ex. 3597 A-B: Table by Dewey prior to 1920.
Green Bag, W. Va.: Wood, A. T., General Manager (R) Tr. 29409.
Hawkeye: Manley, General Manager (R) Tr. 41824.
Lone Star: Koch, Vice President (R) Tr. 33099-100.
Resp. Ex. 2374: Table by Lone Star 1909.
Resp. Ex. 2375: Table by Texas 1920.
Resp. Ex. 2376 B: Table by Lone Star 1929.
Medusa: Cole, Traffic Manager (R) Tr. 40786-87.
Missouri: Alexander, President (R) Tr. 37332-33.
Monarch: Brooke, Vice President (R) Tr. 42234-35.
Resp. Ex. 3428: Table by Monarch in 1908.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36571-72.
Oklahoma & Arkansas: Thompson, Sales Manager (R) Tr. 46510, 46513.
Petoskey: Lucas, Vice President (R) Tr. 38710.

[11] Koch, *supra*, Tr. 33095.
Hogan, President, Lone Star (R) Tr. 34676.

[12] Com. Ex. 2849, Resp. Ex. 1354: Freight Rate Books.

dispose of fractions in this manner.[13] This was true during the life of the Cement Manufacturers Protective Association.[14] Executives of several respondents denied any agreement either to use the Institute conversion tables or any other conversion tables or to employ any particular method of disposing of fractions.[15] Some respondents who use the Institute books have never used any conversion tables other than those prepared by themselves.[16] Others who do not use Institute rate books but prepare their own rate information have also always prepared and used

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[13] Alpha: Coogan, Vice President (R) Tr. 23269-71.
Dewey: Moore, R. W., Vice President (R) Tr. 46708-10.
Lehigh: Bowen, Vice President (R) Tr. 27000-01.
Lone Star: Hogan, President (R) Tr. 34676.
Koch, Vice President (R) Tr. 33095-96.
Medusa: Cole, Traffic Manager (R) Tr. 40786-87.
Missouri: Alexander, President (R) Tr. 37357-58.
Monarch: Brooke, Vice President (R) Tr. 42234.
Oklahoma & Arkansas: Thompson, Sales Manager (R) Tr. 46510, 46513.
Nebraska: Hoenig, Sales Manager (R) Tr. 42131-32.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38211-12.
Pittsburgh Plate Glass: Letzkus, Sales Manager (R) Tr. 37746-47, 37753.
South Dakota: Hartley, Sales Manager (R) Tr. 41484-85.
Southwestern (El Paso): Blair, Sales Manager (R) Tr. 39381-83.
The Institute: Reiter, General Manager (C) Tr. 4041-42.

[14] Bowen, *supra*, Tr. 27000-01.

[15] Apt, Traffic Manager (Osborn), Southwestern (R) Tr. 39450.
Cole, *supra*, Tr. 40786-87.
Lucas, Vice President, Petoskey (R) Tr. 38710.
Moore, R. W., *supra*, Tr. 46710, 46719.

[16] Brooke, *supra*, Tr. 42234-35.
Resp. Ex. 3428)
Com. Ex. 3256) Table used by Brooke since 1908.

their own conversion tables.[17] The same is true of South Dakota, a non-respondent, which also prepares its own rate information.[18] Companies use conversion tables because they are quick means of converting rates from cents per cwt. to cents per barrel,[19] although actually the conversion can be done mentally.[20]

The method of disposing of fractions used is not new and peculiar to the cement industry.[21] The same practice is followed in income tax computation[22] and also by railroads themselves in figuring rates to be published in cents per cwt.[23] Rail rates are not, however, published by railroads in terms of cents per barrel and railroads do not, therefore, convert rates from cents per cwt. to cents per

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[17] Blair, Sales Manager (El Paso), Southwestern (R) Tr. 39381-83, Resp. Ex. 2969: Southwestern (El Paso) Table.
Manley, General Manager, Hawkeye (R) Tr. 41824.
Moore, R. W., Vice President, Dewey (R) Tr. 46708-11, 46718-19.
Resp. Ex. 3597 A-B: Dewey table used prior to 1920.
Resp. Ex. 3598 A-B: Current Dewey table.
Resp. Ex. 3599: Dewey table used from 1933-1935.
Resp. Ex. 2339: Bessemer rate book, 1938 containing table.
Resp. Ex. 2718 A-D: Northwestern States books, 1935, containing tables.
Com. Ex. 2609: Illinois book containing table, 1937.

[18] Resp. Ex. 3363: South Dakota book containing table.
Hartley, Sales Manager, South Dakota (R) Tr. 41484-85.

[19] Bowen, Vice President, Lehigh (R) Tr. 27000.
Coogan, Vice President, Alpha (R) Tr. 23269-71.
Parsons, Sales Manager, Volunteer (C) Tr. 5243-44.

[20] Coogan, *supra* (R) Tr. 23269-71.

[21] Hogan, President, Lone Star (R) Tr. 34721-22.

[22] Neylan, Assistant General Sales Manager, Lone Star (C) Tr. 6195-96.

[23] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38477-78, 38212-13, 38575.
Hogan, *supra*, Tr. 34674-75.

barrel.[24] At various times, however, especially following I.C.C. orders authorizing percentage increases in rates, railroads, through publishing agents, have issued schedules containing rules for disposition of fractions appearing in rates per cwt. and rates per car.[25]

In billing freight charges, railroads compute the total charge on the basis of the rate per cwt. On a carload shipment, for example, the railroad charge would be the number of cwt. in the car times the rate per cwt. and if any fraction of a cent remains after this computation is made, it is dropped if less than one-half and added if one-half or over.[26] Actual freight is paid to the railroad on this basis,[27] and cement companies put the actual freight computed in this manner on their invoices and bills of lading.[28] Prices, however, are figured on the basis of rounded off per barrel freight rates and the result is that actual mill nets per barrel are more or less than mill nets derived from the rounded off freight figure per barrel.[29]

A carload, at the present time, usually consists of 50,000 pounds or 132 barrels.[30] Meyers, the Traffic Man-

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[24] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38574-75.

[25] Moore, R. W., Vice President, Dewey (R) Tr. 46720-21, 47268-69.
Resp. Ex. 3600 A-B: Leland supplement 8/16/20.
Resp. Ex. 3601 A-C: Agent's tariff 6/20/22.

[26] Browder, *supra*, Tr. 38574.
Hogan, President, Lone Star (R) Tr. 34722-25.
Koch, Vice President, Lone Star (R) Tr. 33096-98.
Meyers, Traffic Manager, Huron (R) Tr. 33533-35.
Reiter, General Manager, The Institute (C) Tr. 4043.

[27] Reiter, *supra*, Tr. 4043.

[28] Parsons, Sales Manager, Volunteer (C) Tr. 5247.
Com. Ex. 1074 A.

[29] Browder, *supra*, Tr. 38574.
Com. Ex. 958-A-B: Correspondence between B. S. Smith and Dr. Burns.

[30] Koch, *supra*, Tr. 33096-98.

ager of Huron, was asked by counsel for the Commission to compute the difference between the actual rail freight and the company's freight charges on a carload at a rate per cwt. of 10½¢. He computed 39.9¢ per barrel which would be figured at 40¢ and the extra charge of one mill per barrel on a carload would come to 13.12¢ per car.[31] Had the difference been the highest possible amount of five mills instead of one, the difference would have been 66¢ equal to ½¢ per barrel on a minimum carload.

Tests over a period of time as between adding and dropping fractions per barrel showed that they washed out one another so far as the companies were concerned.[32] However, the Institute conversion table could not be used to determine the actual railroad charges on a shipment of cement.[33] Hogan, President of Lone Star testified that the difference is too slight to warrant any change in the methods *used by companies*[34] and Neylan, Vice President of Lone Star testified that customers never raised any question concerning the disposition of fractions.[35]

E. Accuracy of Institute Freight Rate Books.

1. Effective Date of, and Errors in, Official Tariffs

The Interstate Commerce Act requires that a rate be made effective on a day certain and that at least one day's notice be given and not less than 30 days' notice except

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[31] Meyers, Traffic Manager, Huron (R) Tr. 33533-37.

[32] Hogan, President, Lone Star (R) Tr. 34720-22.
Koch, Vice President, Lone Star (R) Tr. 33096-98.

[33] Meyers, *supra*, Tr. 33547-48.
Moore, R. W., Vice President, Dewey (R) Tr. 47265-66.

[34] Hogan, *supra*, Tr. 34720-22.

[35] Neylan, Assistant General Sales Manager, Lone Star (C) Tr. 6195-96.

with the permission of the I.C.C.[1] By far the larger number of rates authorized by the I.C.C. go into effect after 30 days' notice although a comparatively small number do go into effect on from one to 29 days', usually 5, 10, or 15 days' notice.[2] An average of 8 or 10 applications are filed with the I.C.C. almost daily for permission to change rates on one day's notice, the purpose being to correct errors in an official tariff or supplement. Many of these are refused.[3] Where the I.C.C. does issue an order permitting change on less than 30 days' notice, the carriers involved usually take advantage of it.[4]

A freight rate is legal after it is filed with the I. C. C.[5] and official tariffs filed with the I.C.C. contain the only correct rates.[6] I.C.C. employees frequently find what appear to be errors in official tariffs on file.[7] The I.C.C. employs a force of 30 or 40 traffic examiners who check into certain types of errors and it also has a Board of Suspension which occasionally acts on its own motion and calls the attention of the I.C.C. to improper rate adjustments and rates.[8]

Such a "tariff error" is a mistake in compilation or publication of a tariff whereby the copies of the tariff filed with the I.C.C. and in freight stations throughout the system contain a rate in an amount that was not intended, or

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[1] Blocher, Manager of Freight Rate Bureau, The Institute (R) Tr. 48037.
Cole, Traffic Manager, Medusa (R) Tr. 40766-67.
Moore, R. W., Vice President, Dewey (R) Tr. 46684-85.
Simpson, Rate Clerk, I.C.C. (C) Tr. 9405, 9429-31, 9551-52.

[2] Simpson, *supra* (C) Tr. 19292.

[3] Cole, *supra* (R) Tr. 41412-16.

[4] Simpson, *supra* (C) Tr. 9405.

[5] Cole, *supra*, Tr. 40813.

[6] Simpson, *supra*, Tr. 19300.

[7] Id., Tr. 19252.

[8] Id., Tr. 19302.

a provision surrounding a rate which does not clearly express the intention of the publisher or expresses an improper intention of the publisher.[9] If an error is found when a shipment is about to be made, the carrier involved can handle the situation, if time permits, by filing a six section application with the I.C.C. asking to change the rate on its purported effective date if the error is discovered prior to that date, or, if not, on short notice. If time does not permit of making the change in this manner, the shipper may make his shipment under the erroneous rate and take a chance on getting a reparation either on the special or on the formal docket.[10] However, the traffic manager of a respondent has found instances where, in his opinion, railroad tariffs were in error and in such instances, he has written to the interested railroads who have made changes in the rates.[11]

2. Company Cooperation in Checking Institute Books and Reporting Errors and Changes

When Reiter mailed the original books from the Chicago Bureau in 1930, he wrote the traffic managers to whom they were sent:

> "We request that each traffic representative and, in fact, each user of the book, be on the look-out for mis-statements of rates appearing in these books or for changes made in railroad tariffs which we do not cover by correction notices. Communications in relation to these matters, covering all freight rate books issued by this office, should be addressed to 'The Cement Institute Freight Rate Bureau, 176 West Adams Street, Chicago'."[1]

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[9] Simpson, Rate Clerk, I.C.C. (C) Tr. 19323-24.

[10] Id., Tr. 19291-93.

[11] Cole, Traffic Manager, Medusa (R) Tr. 40813.

[1] Resp. Ex. 2940: Reiter to Galster, 5/19/30.
Also Com. Ex. 933-7 R: Reiter to Members, 2/21/34 on issue

Since that time it has been customary for traffic managers of several companies to notify the Institute bureaus of errors or fancied errors discovered in the books. Such notifications have usually been in letters,[2] although at times such information has been transferred by telephone or telegraph.[3] The result has been that Institute rate books are more accurate than any previous rate book compilations, since being more widely used, the greater is the possibility

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[2] Alpha: Coogan, Vice President (R) Tr. 24616-17, 24631-33.
Ash Grove: Sunderland, President (C) Tr. 13711-13;
Com. Exs. 993 A-D, 995 A-B, 996 A-B: Correspondence between Barton and Chicago Bureau.
Cowham: Com. Ex. 1001 A-C: Correspondence with Bethlehem Bureau.
Hermitage: McGovern, Sales Manager (R) Tr. 36387.
Huron: Meyers, Traffic Manager (R) Tr. 33527;
Com. Ex. 424 A-I: Correspondence between Meyers and Reiter; Resp. Ex. 163 A-B: Correspondence between Meyers and Blocher.
Kosmos: Resp. Exs. 162 A-B, 164 A-B: Correspondence with Chicago Bureau.
Lehigh: Bowen, Vice President (R) Tr. 26999-7000.
Lone Star: Com. Ex. 1003 A-B: Correspondence between Sackriter and Reigart.
Louisville: Resp. Ex. 161 A-B: Correspondence between Uptegrove and Chicago Bureau.
Medusa: Com. Ex. 545-4 L-4 M, Resp. Ex. 3208: Correspondence between Cole and Chicago Bureau.
Penn-Dixie: Com. Exs. 1004 A, 1138 N: Letters to Bethlehem Bureau.
Volunteer: Resp. Exs. 2239, 2242 A-B, 2245 A-E: Correspondence between Roberts and Reigart of Bethlehem Bureau.
Roberts, Traffic Manager (R) Tr. 31747-54, 31791, 31925-26.
West Penn: Com. Ex. 549-2 A-2 B: Correspondence between Fleming and Bethlehem Bureau.

[3] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38214.
Neylan, Assistant General Sales Manager, Lone Star (C) Tr. 6215, 6656.

that any errors are detected and corrected to the benefit of all users.[4]

In their use of Institute freight rate books, several companies check only those rates that seem doubtful to the clerks who handle orders and are thus familiar with rates from day to day.[5]

Bowen, the Vice President of Lehigh, testified:

> "Q. Are the Institute rate books used by your traffic department? A. No. The only function of our traffic department on the books is to check and see that they are what they are supposed to be; that is, correct statements of the freight rates. When a new book is received it is checked by our traffic department. If the traffic department develops that there are any errors in the book, those errors are called to the attention of the Institute and correction is made before the books are turned over to us. Then, after that, our traffic department does the same thing with respect to any supplements, and if our traffic department does learn of any changes other than what is contained in the supplements that information is given us and we use that information even before the Institute's supplement comes through. In other words, our whole purpose of our traffic department with respect to the books is to see that they do give us the correct freight information."[6]

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[4] Bowen, Vice President, Lehigh (R) Tr. 27001.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38185, 38562-63.
Coogan, Vice President, Alpha (R) Tr. 23274.

[5] Brooke, Vice President, Monarch (R) Tr. 42393-94.
Calvin, President, Aetna (R) Tr. 30351-52.
Elliott, Vice President, Whitehall (R) Tr. 28683-84, 28686-87.
Horner, President, Kosmos (R) Tr. 37036.
Koch, Vice President, Lone Star (R) Tr. 32773.
McGovern, Sales Manager, Hermitage (R) Tr. 36163-64, 36387, 36408-09, 36433-35.

[6] (R) Tr. 26999-700.

Robeson, Vice President of Nazareth, stated that it was his company's experience that the rates shown in the Institute books are completely dependable and his company feels there is no reason to check all rates used since to do so would be to do work it is trying to avoid by using the books.[7]

G. E. Warren, Vice President of the Osborn, Ohio plant of Southwestern, stated that his company keeps a card index of freight rates and the clerks who compile this index copy rates from the Institute books without checking against the tariffs.[8]

McKee, Vice President of West Penn, takes rates from the Institute books without checking. It is a small company and does not have time to do so and believes the percentage of error in the books are small. The amount of loss involved by any error is less than the cost of checking.[9]

Alpha is more particular. Fellows, its Western Sales Manager, testified that Alpha's traffic department checks the rates in the Institute books against the official tariffs and testified further:

> "Q. And if they find differences, they, then take it up with the Institute bureau; is that right? A. Well, if I was a traffic man I would want to find out if I had placed a right interpretation on it, or if there is any difference between the two, why; then, who is right and who is wrong.
>
> Q. And until you found out who was right and who was wrong, you could not quote on a particular piece of business involving that disputed question? A. No, that is not right at all. We use the interpretation that we have placed on that, whether it agreed with the Institute or not.

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[7] (C) Tr. 4027-28.

[8] (R) Tr. 29368-70.

[9] (R) Tr. 27884-85, 27892.

Q. Yes. A. We would use what we had found it, because we think we have a darn good—pardon me—traffic department.'"[10]

The result of Alpha's checking is to keep the books up to date for the use of the sales department.[11]

Browder, Traffic Manager of Penn-Dixie, testified that he believes the wide use of the books tends to insure their accuracy.[12]

Four companies, upon receiving copies of the books, turned them over to their traffic departments for complete check.[13] The purpose of two companies was stated to be to see that the books give correct information.[14] Executives of other companies stated without further amplification that their companies have checked rates shown in Institute books against official tariffs.[15]

Two companies that use Institute books only occasionally to check their own compilations, do not call the Insti-

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[10] (R) Tr. 25829-31. Also Tr. 25824-25.

[11] Coogan, Vice President, Alpha (R) Tr. 24856, 24616-17.

[12] (R) Tr. 38563.

[13] Edison: Sweeney, Vice President (R) Tr. 35803-04.
Lehigh: Bowen, Vice President (R) Tr. 26999-7000.
Medusa: Cole, Traffic Manager (R) Tr. 40757-59, 41381-82.
National: Dannelly, Vice President (R) Tr. 39590-91.

[14] Bowen and Cole, *supra*.

[15] Alexander, President, Missouri (R) Tr. 37315-16, 37356-57: uses Institute book to check own books for possible errors. Always refers to tariff for final rate.
Bates, J. E., Sales Manager, Federal (R) Tr. 30760-61: has found some errors.
Horner, President, Kosmos (R) Tr. 37034-35: tariffs are checked and card system is based on both tariff and Institute book.
Meyers, Traffic Manager, Huron (R) Tr. 33305-07, 33526-27: when quotations differ, he checks own book against tariff. If it agrees, he then checks it against Institute book. When he finds a difference, he uses his own book.
Roberts, Traffic Manager, Volunteer (R) Tr. 31916-20, 32006.

tute's attention to discrepancies but merely correct their own rates.[16]

It was the policy of Lone Star to utilize as a basis for its price computations only those freight rates published by or known to the Institute. When Fontaine, the company's agent at Norfolk, Va., utilized a rate promised by the railroad but not yet published as an official railroad tariff, Neylan, Vice President of Lone Star wrote him:

> "We recall a short time ago a job taking delivery in Princess Anne County on which Armstrong & Company were low bidders and in connection with which the Norfolk Southern Railroad applied a special rate which resulted in a reduction in the destination price of about 3¢ per barrel.
>
> In connection with matters of this kind where freight rates are changed and where these freight rates are used as the basis of bidding delivered prices we should not lose sight of the fact that the Cement Institute is still functioning to the extent of furnishing freight rates and notices of correction in connection with these rates.
>
> We wish, therefore, that when a case of this kind arises where we have knowledge of a change in freight rate the information be passed along promptly to the Cement Institute in order that they may publish the change and acquaint the industry with the changed condition. After all, the freight rate books are still the basis of our price computations and we have always followed the rule of utilizing only those rates which are published in those rate books.
>
> You can readily appreciate that, to keep this information up to date, notices of correction that come to our attention should be passed along promptly to the Cement Institute for necessary publication."[17]

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[16] Dewey: Moore, R. W., Vice President (R) Tr. 47360-63.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36701-02.

[17] Com. Ex. 287 A: Neylan to Fontaine 10/15/36.

Neylan again wrote to Fontaine on this subject saying:

"You are aware of the conditions surrounding the issuance and maintenance of these price books. The Freight Rate Bureau depends to a great extent upon the member companies to furnish them with information having to do with rate changes. The Rate Bureau cannot be expected to maintain the close scrutiny over cement rates that is possible by members of the industry. On the other hand the freight rate books are furnished to members of the industry as the official rate basis and, as such, they are accepted by the industry as containing the rates on which prices are based.

The reason for this is perfectly obvious. To do otherwise would quickly result in a chaotic condition due to local changes in rates which would be known to those companies most deeply concerned and would probably be overlooked by the companies whose interest was not quite as great.

[Italicized part quoted in Fdgs. Par. Eight (d)]

[*So far as our company is concerned, we have always worked on the policy that the freight rates shown in the rate books are the only rates we will use in the computation of prices. If we have knowledge of any rates that are different from those in the rate book, then we have an obligation to inform the Rate Bureau of the new rate before such a rate is used in computing a price.*]

This procedure was not followed in the case of Diamond Springs. Apparently you had knowledge, through your Traffic Department of the rate reduction on the Norfolk Southern Railroad which applied to Diamond Springs but you failed to notify the Rate Bureau of this fact with the result that Diamond Springs as of the present moment still carries a 5½¢ rate plus the emergency charge in the rate book whereas we know the proper rate is 5¢ per 100 pounds without the application of the emergency charge.

We believe it is your duty to notify the Rate Bureau of the present rate to Diamond Springs in order that they may issue the necessary supplement.

The same is true of any other stations on this division which were not listed in the original supplement.

We want this procedure followed in future. If you have knowledge of any different rates applicable to cement than those appearing in the Freight Rate Book we want you to notify the Rate Bureau immediately in order that a supplement may be issued for the benefit of all members of the industry. That is the policy of our company and the reason for the policy is perfectly obvious."[18]

Neylan was closely examined by the Commission's counsel upon the subject matter and meaning of these letters and asked as to his intent in forbidding the use of a rate not published in the Institute's books and not known to the Institute and which resulted in a lower price to the customer than the use of rates that were published. Neylan testified:

"Q. Wasn't this a case where your company took a piece of business at the correct freight rate, which happened to be lower than the rate that was published at the time in the Institute Rate Book? A. It is not.

Q. What is this reference then in Exhibit 287-A in which you tell your Norfolk Sales Manager, Mr. Fontaine, that you recalled a job taking delivery in Princess Anne County, and in connection with which the Norfolk & Southern Railroad applied a special rate, which resulted in a reduction at the destination price of about three cents a barrel? A. That rate was not in effect at the time that job was taken. We could not check the rate as being actually in effect, we could not get Tariff authority or anything else. It was a mere statement made by an official of the Norfolk & Southern Railroad to one of our salesmen in the field.

Q. It was in effect when you shipped, wasn't it?

[18] Com. Ex. 287 B-C: Letter dated 11/11/36, Neylan, General Sales Manager, Lone Star to Fontaine, Sales Manager.

A. That he expected to reduce that price, but the contracts are taken long before shipments move.

Q. Was it in effect when the shipment was made? A. It finally went into effect.

Q. It was shipped at that special rate, the lower rate? A. It is possible that all of it was shipped, at that. There may have been some change afterwards, I am not sure. But that rate was not in effect at the time that we entered into that contract with that contractor.

Q. You criticized your Norfolk Sales Manager, didn't you, because he had used this special rate, rather than the Institute Rate Book? A. It was not a rate. That is the only criticism that was directed toward him, that he used a rate that was not a rate. It was an indirect promise from the official of the company that they thought they would do it.

Q. And they did do it? A. Yes, and that was the thing that got us the job.

Q. At any rate, you informed him that he should follow the freight rate compilations of the Institute? A. I did not tell him anything of the kind. As I recall it, I told him that if he had any knowledge of a rate change, that he should report it to the Institute, and then use it.

Q. And not use it until it was reported to the Institute? A. I told him as a matter of procedure, in order to keep our records straight, to report it to the Institute and then use it. I did not mean that he had to wait until the Institute issued freight rate notices, however.

Q. In other words, he could use it as soon as he reported it, and before it was published? A. As soon as he reported it, he was absolutely at liberty to use it, and that is the procedure that we have followed in every part of the country.

Q. You told him, did you not, in Exhibit 287-A, 'that the freight rate books are still the basis of our price computations, and we have always followed the rule of utilizing only those rates which are published in those rate books. A. Provided the rates are correct. They understand that and we understand it.

Q. Aren't there a lot of correction sheets that are issued from time to time? A. That is true.

Q. On the Cement Institute Rate Book? A. That is true.

Q. And aren't many of those correction sheets, don't they carry the notice 'Effective immediately?' A. Some of them, yes, sir.

Q. Railroads cannot make their changes in rates effective immediately, can they? A. That is because probably the Institute Rate Book had not been notified prior to the time the rate actually went into effect.

Q. Railroads cannot make their changes in rates effective immediately, can they, is what I asked you? A. They can make it on one day's notice.

Q. But not immediately? A. Well, one day's notice is virtually immediately.

Q. They can always do it on one day's notice? A. They can get permission from the Interstate Commerce Commission to issue a rate on one day's notice.

Q. You considered that you were under obligation to notify the Institute before using a changed rate? A. I don't feel that I am under obligation to notify the Cement Institute of anything. I wanted that procedure followed in order to ensure the accuracy of that rate book, because we use that rate book, not alone for pricing, but for shipping.

Q. When you used it to calculate the delivered prices based on the other mill's base prices, you did not use it for shipping purposes there? A. We use it for shipping purposes from our own mill if we get the business.

Q. But I asked you about when you are calculating the delivered price, based on the other mills' base prices? A. The only time we can use it for shipping purposes is when we shipped. You certainly are not going to be called upon for shipping purposes from some other mill.

Q. All right. That answers my question. You were interested here in this instance in the freight rate books as based on your price computations? A. We were interested in that particular instance in using an actual rate that was in effect at the time that we quoted our price, and that is the basis that

we used at all times,—not some rate that somebody promises that he may or may not put into effect later on. That was the instance in that particular case. We checked for days before we could even get a tariff reference on that particular change.

Q. But even though you had knowledge of a rate actually in effect, a lowered rate actually in effect, you would not, in line with your policy, use it until you had reported it to the Institute, would you? A. We would use it the same day that we reported it, and that would be the day that we found it. The minute we report it, we consider that we are at liberty to use it, because that rate is in effect. We want that procedure followed in order to keep our books accurate and that is the only reason for it.

Q. Then why do you say in your letter that 'You always pass along promptly to the Cement Institute, the knowledge of a change in the freight rates'? A. Because when we report that rate to the Institute, we consider that that rate is in that book.

Q. As a matter of fact, it has not been published? A. It is published, so far as we are concerned.

Q. It is not—it has not gone out to the rest of the industry? A. I don't care about the rest of the industry; I am not interested in them. Particularly at Norfolk, I don't give two whoops what the industry thinks about it.

Q. You were interested somewhat in this instance, in the rest of the industry? A. No, sir; I was interested in keeping our own company within the proper bounds, using rates that are actually in effect, and not something that is promised for some time in the future.

Q. Now, in your letter to Mr. Fontaine, dated November 11, 1936, Exhibit 287-B, you said, 'The freight rate books are furnished to members of the industry as the official rate basis, and as such are accepted by the industry as showing the rates on which prices are based?' A. The correct rates, as the official basis, as an official basis of rates.

Q. For pricing purposes? A. And for shipping purposes, as far as we are concerned.

Q. You did not say anything about shipping pur-

poses here? A. I did not know that you were going to get that letter and question me on it. If I had, I would have gone into detail, but I do not have to explain to our people what they already know.

Q. Now, you say you are not interested in what the other companies do. Are you interested in whether you get a lowered delivery price, delivered price than they? A. I am interested to this extent, that we want to get as fair a price as we possibly can, but so far as any agreement with any of our competitors, or anything of that kind, I am not interested particularly around Norfolk, because I do not have to be.

Q. You were interested in getting a lower delivered price in this instance than your competitor? A. Our Norfolk office was very much interested, and that is the reason they jumped the gun.

Q. And that is the reason you criticised them for it. A. I criticised them for using a rate that was not in effect, and that was the only criticism.

Q. And making a lower delivered price than the rest? A. That would naturally follow. But the job was ours, sewed up from the beginning. There was not any question about it. And that was the situation before he ever got the contract.

Q. You say you were not interested in what your competitors did in this case, or generally? A. Not on that particular job, because the job was ours before he got it.

Q. In criticising Mr. Fontaine, you said this:

'the reason is perfectly obvious'——

that is, the use of the Institute rate book——

'as the official rate basis accepted by the industry containing the rates on which prices are based.'

and you went on to say:

'The reason for this is perfectly obvious. To do otherwise would quickly result in a chaotic condition, due to local changes in rates which would be known to those companies most deeply

concerned, and would probably be overlooked by the companies whose interests were not quite as great."

A. That is true, and that is a fact.

Q. Yes, I think it is a fact. And yet you say now that you were not interested in whether the other companies got it or not? A. I am interested in the procedure, in keeping that rate book correct. I am also interested, naturally, in getting as good a price as we possibly can get.

Q. You mean by that, not a lower price than your competitors? A. Not having our competitors quote a lower price than us.

Q. And here you were interested in not quoting a lower delivered price than your competitors? A. No, I was not interested in anything of the kind. I was interested in quoting a price on a rate that was actually in effect, not something that was promised. That is the basis of that story.

Q. And you knew and stated in your criticism of Mr. Fontaine that these rate books of the Institute were the official basis on which the industry calculated its prices? A. The official rate basis, so far as the accuracy of the rates are concerned. Those rates actually represent tariff rates, and that is what we have found it, and that is what I have always understood them to be. Now, this rate which was given to a salesman in the field, and if we are going to allow salesmen in the field who talk to railroad men and get rather vague promises of rate changes in the future, to go ahead and use them, we have not got anything left."[19]

Counsel returned to the subject later and Neylan's testimony continued, as follows:

"Q. In your letter to Mr. Fontaine of November 11, 1936, Exhibit 287-B, you told him: 'The freight rate bureau depends to a great extent upon the member companies to furnish them with information having to do with rate changes. The rate bureau can-

[19] (C) Tr. 6199-208.

not be expected to maintain a close scrutiny over cement rates that is possible by members of the industry. On the other hand, freight rate books are furnished to members of the industry as the official rate basis and, as such, they are accepted by the industry as containing the rates on which are based prices.'

Then you go on to refer to this chaotic condition if they did not do that. Do you mean by that chaotic condition a condition where prices at certain destinations would be not identical? A. No, I mean by that that the rate book would carry a lot of rates that would not actually or were not actually shipping rates. In other words, we are closer to the situation on Norfolk than practically any of the other people in the industry or the rate book itself. We stay closer to it than they do; therefore if we get any notices of rate changes I think it is our duty to correct that book so as to make it reflect the correct rates.

Q. Even if you get notice of a reduction that would enable you to make a lower delivered price than your competitors, do you think you ought to notify your competitors so that they can make a lower delivered price.

* * * *

The Witness: If that notice is official, if there is not any question as to the application of the rates, then that rate can be used by us, and we will use it.

By Mr. Wooden:

Q. Yes, but not without notifying your competitors? A. We do not notify our competitors.

Q. You notify the Institute? A. We notify the Institute, and it is up to our competitors to look out for themselves from that time on.

Q. Is it up to the Institute to notify competitors? A. I assume so, but I am not concerned with that. I want that rate notice for our own protection, as well as anything else.

Q. Do they send telegraphic notice of such reports? A. No, they do not, not that I know of.

Q. If you put it into effect the day you reported

it, you would have a lower delivered price, wouldn't you, than others? A. Yes; and I believe that is all right. I am perfectly willing to go on that basis.

Q. You were not criticising Mr. Fontaine because his practice there had resulted in making a price lower than the delivered prices of competitors? A. As I told you previously, I was criticizing Mr. Fontaine for having utilized a rate, for making a quotation for which there was no official basis for the application of that rate at that time, and we could not check it, and neither could he, beyond the fact that the Norfolk-Southern Railroad had told one of our men in the field that that probably would put that station on the map.

Q. Did you telegraph the Institute regarding changes in the freight rates that you already have? A. Sometimes we do.

Q. And telephone them? A. Sometimes—we have not [sic.] telegraphed and we have used air mail.

Q. It depends upon the urgency with which the matter comes up, I suppose? A. Not necessarily. We want the notice to get over as fast as we can, if the rate is in effect at the time we signed it.

Q. You say in your letter to Mr. Fontaine dated November 11, 1936, Exhibit 287-B that you have always worked on the policy that the freight rates shown on the rate books 'are the only rates we will use. If we have any knowledge of any rates different from those in the rate books, then we have an obligation to inform the rate bureau of the new rate before such a rate is used in computing a price.' A. That is true, with this exception, that when we report a rate to the Institute, having an official basis, we consider that that rate is in the book. Our people understand that, and we understand it. Otherwise, I would have said in there that you wait until the Institute sends their notice out."[20]

Hermitage purposely neglected to notify the Institute of a rate change it had been instrumental in securing and

[20] (C) Tr. 6212-16.

used the reduced rate as a means of giving a contractor customer a price below the current price.[21]

One company which has found on rare occasions what it thought were rate errors has never reported them for the reason that it was too busy or not sufficiently certain of the supposed error to call it to the Institute's attention.[22]

3. Correction Sheets

If after investigation the Institute rate bureau experts conclude that there is an error, a correction notice is promptly sent out,[1] the date of issue appearing on the sheet being the actual date on which the sheet is mailed.[2] The notices are sent to all subscribers.[3]

Correction sheets are used to correct errors in the books but this is a minor use for them as compared with other uses.[4] In general terms, the function of correction notices is to keep the rate books up to date.[5] Other than correction of errors, the sheets contain information for subscribers with respect to changes in tariff rates by railroads,[6] abandonment of stations by railroads, (a) additions of new stations by railroads,[7] changes in status of stations by rail-

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[21] McGovern, Sales Manager (R) Tr. 36167-68.

[22] McKee, Vice President, West Penn (R) Tr. 27885-87.

[1] Reiter, General Manager, The Institute (C) Tr. 4078-81, 16870.

[2] Blocher, Manager, Freight Rate Bureau, The Institute (R) Tr. 48021.

[3] Coogan, Vice President, Alpha (R) Tr. 24617.

[4] Reiter, *supra* (C) Tr. 16870.

[5] Reiter, *supra*, Tr. 16869-70.

[6] Brooke, Vice President, Monarch (R) Tr. 42197-98.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38215.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39920.
Reiter, *supra* (C) Tr. 16844, 16869-70.

[7] Brooke, *supra* (R) Tr. 42197-98.

roads from carload to less than carload delivery stations, (b) whether or not the route covering the rate has been eliminated,[8] elimination by railroads of facilities for handling freight,[9] (c) changes in status of stations from open to pre-pay or vice versa,[10] (d) removal of emergency rate charges,[11] and tables for computation of emergency rate charges. The latter are copied from supplements to railroad tariffs.[12]

Prompt information with regard to new and abandoned stations is necessary because otherwise a shipper might attempt to ship to a station where freight is no longer received or might have no knowledge of a new station through which he might serve his customer.[13]

4. Rate Errors in Institute Books

The manager of the Chicago Rate Bureau stated that in proportion to the total number of rates he has published over his ten year period in charge of the Chicago Bureau, the number of erroneous rates that have appeared in the

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[8] Twenty-three sheets out of 57 to L. Michigan #2 show such information (Com. Ex. 3020).

[9] Two sheets out of 44 to Indiana #1A (Resp. Ex. 160).

[10] Forty-four out of 74 sheets to Illinois #2 (Com. Ex. 3013).

[11] Wood, General Manager, Green Bag, W. Va. (R) Tr. 29869.

[12] Roberts, Traffic Manager, Volunteer (R) Tr. 31789-90.

(a) Of 996 correction sheets, applicable to 20 books in evidence, 338 contained information as to abandoned stations.

(b) Of 819 correction sheets, applicable to 16 books in evidence, 69 contained information as to LCL stations.

(c) Of 715 correction sheets, applicable to 12 books in evidence, 45 contained information as to facilities for handling freight.

(d) Of 576 correction sheets, applicable to 12 books in evidence, 262 deal with changes from open to pre-paid stations.

[13] Reiter, General Manager, The Institute (C) Tr. 16870.

books and correction sheets has been very small.[1] On the whole, the Institute books are accurate compilations of freight rates as they appear in official tariffs.[2] The discoveries of error, therefore, are infrequent[3] and several companies testified that they had never discovered errors.[4] Lone Star found very few errors.[5] Kosmos made several objections to rates and was right at least once.[6] Southern States found errors only once[7] and Medusa, though finding a few errors, found none in markets where it sells as much as four or five carloads a year.[8] National found some errors[9] and Monarch found a few in ten years.[10] Browder, its Traffic Manager was cross examined as to this as follows:

> "Q. Do you recall your testimony on direct to the effect that in 10 years you had found only 10 errors in The Cement Institute freight rate books? A. No. I did not intend to testify that way if I did, Mr. MacIntyre.
>
> Q. Well, will you tell us now what you did intend to testify to in that respect? A. I said that I had only found errors in the freight rate books

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[1] Blocher, Manager, Freight Rate Bureau, The Institute (R) Tr. 48041, 48043.

[2] Coogan, Vice President, Alpha (R) Tr. 23272, 24632-33.
Robeson, Vice President, Nazareth (R) Tr. 28396.

[3] Reiter, General Manager, The Institute (C) Tr. 16874.

[4] Robeson, *supra* (R) Tr. 28432-33.
Warren, F. B., Vice President, Bessemer (R) Tr. 32439.

[5] Koch, Vice President (R) Tr. 33173.
Neylan, Assistant General Sales Manager (C) Tr. 6330.

[6] Horner, President (R) Tr. 36982, 36985-86.

[7] Elcock, Vice President (R) Tr. 37525, 37614-15.

[8] Cole, Traffic Manager (R) Tr. 40759-60.

[9] Dannelly, Vice President (R) Tr. 39590-91.

[10] Brooke, Vice President (R) Tr. 42293.

on a few occasions, and I would estimate that it was only about ten times. In other words, that I took up with The Cement Institute for correction in the book.

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Q. You did not mean to say, then, that you had not found but ten errors; is that correct? A. No. I do not recall how many errors were involved in each of the instances; sometimes it might involve a freight rate base point rate that involved several destinations.

Q. Is it your testimony now that you informed The Cement Institute every time that you found an error? A. Yes.

Q. What books of The Cement Institute have you looked through for the purpose of determining whether they contained errors? A. I have not checked from cover to cover any books issued by the Institute.

Q. Just how deeply have you gone into them for the purpose of determining whether they are erroneous in any respect? A. Why, the only time I have done any particular checking was in connection with projects when they came up; I would sometimes examine the tariffs against the freight rate books at those particular points, what States they were in and how often I have done that I cannot say, but I have never made a cover-to-cover check of the freight rate books.

Q. What percent of the total number of points in those books will you estimate that you have checked? A. Oh, it would be hard to say, probably——

Q. Five percent? A. No, not that many. Maybe a thousand, or five thousand; I do not know how many points in the course of years that I have checked. It would be very hard to estimate it. In some of the books I presume there are as many as 20,000 rates."[11]

Ash Grove found alleged errors in checking against its own books[12] and Missouri found a few errors in checking

[11] (R) Tr. 38563-65.

[12] Barton, Traffic Manager (C) Tr. 14440-41.

against its own books.[13] Huron discovered some erroneous rates during the Code days[14] and Dewey found discrepancies between its own and Institute books.[15] On ten occasions in ten years Penn-Dixie cited errors to the Institute.[16]

The number of errors cited in the record is fifty-four. These, scheduled by states, show:

Minnesota	8	errors
Texas	2	"
Oklahoma	4	"
Nebraska	2	"
New Mexico	2	"
Iowa	1	"
Missouri	1	"
Illinois	5	"
Indiana	1	"
Kentucky	4	"
Maine	1	"
New Hampshire	2	"
Mississippi	4	"
North Dakota	2	"
South Carolina	1	"
Georgia	1	"
Florida	13	"

Thirty-eight of these fifty-four errors were located by an employee of the I.C.C. who devoted one week of his own time and three weeks of the time of each of three other men in checking the books and tariffs for these errors.[16] The largest station to which any error discovered by this I.C.C. employee was in the rate from Detroit, Michigan to Evansville, Indiana, with a population of 102,250 persons.[17]

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[13] Alexander, President (R) Tr. 37356-57.

[14] Meyers, Traffic Manager (R) Tr. 33528-29.

[15] Moore, R. W., Vice President (R) Tr. 46700, 47260.

[16] Browder, Traffic Manager (R) Tr. 38213-14, 38563-65, 38598-99.

[17] Simpson, Rate Clerk, I.C.C. (C) Tr. 19279-80.

The balance of the stations had populations varying from zero to 450.[18]

5. Instances of Delay by Institute in Issuance of Correction Sheets

The Traffic Manager of Volunteer stated that advance information of rate changes is given to the public by the I.C.C. and that the Institute naturally has this information.[1] With the assistance of the witness Simpson, a Rate Clerk employed since about 1928 by the Interstate Commerce Commission to check freight rates in connection with matters before the Commission and for other cases, the record discloses at least forty instances where Institute correction notices were late in announcing changes in official tariffs. The delays in these instances varied from one day to seven months.[2] An offer of proof was made to show that of 22 destinations involved in these errors, 10 had no population, the others had populations averaging from 6 to 450 and that Evansville, Indiana, with a population of 102,000 was the only station of importance in the list.[3] In seven other cases, rates involved were from the mills of a company that had no customers at the points involved, and had never shipped cement or mailed quotations to those points.[4]

6. Institute Practice: Effective Date

When railroads give notice of a change in rates, Institute notices of the change are made effective as of the an-

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[18] (O.P.) Tr. 19295-96.

[19] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38469-75.

[1] Roberts (R) Tr. 31924-27.

[2] Simpson, Rate Clerk, I.C.C. (C) Tr. 9428-29, 9444-45, 9450-52, 9531-40, 9582-86, 9587-92, 9659-64, 9768-88, 9832-33, 10698-702, 18888-90, 18897-906, 18915-19, 19264-67.

[3] Tr. 19295-96.

[4] Browder, *supra*, Tr. 38469-70, 38475.

nounced date of the change[1] and are issued directly after the new tariff or supplement appears.[2] Many Institute rate book correction sheets, however, carry, in addition to a future date, for some corrections, other corrections stated to be "effective immediately." The latter deal for the most part with matters other than changes in rates as for instance, the abandonment by railroads of stations carried in the books, conversion of a particular station from a carload to a less than carload station or addition of rates from some headline point to new stations. In all such situations, the manager of the Bureau does not deem it necessary to trace the particular change back to its effective date.[3]

Of the total of 2535 correction sheets put in evidence, applicable to 38 books, 956 contained corrections "effective immediately" and 438 of these pertained to changes in rates currently carried in the books.[4] In such cases, the rate corrected is probably one which, through typographical error on the part of the Institute Bureau, was incorrect as originally published in the book. This being the situation, the Bureau manager sends the notice out as soon as the error is discovered.[5]

7. Revisions and Reissues of Books

As Institute rate books became increasingly supplemented by correction notices, they were revised and reissued.[1] The original books issued by all Bureaus were

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[1] Reiter, General Manager, The Institute (C) Tr. 4081.

[2] Roberts, Traffic Manager, Volunteer (R) Tr. 32008.

[3] Blocher, Manager, Freight Rate Bureau, The Institute (R) Tr. 48038-39, 48043.

[4] Com. Exs. 3009-3040, 1316, 1078;
Resp. Exs. 160, 3694, 3754.

[5] Blocher, *supra*, Tr. 48039-40.

[1] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38185-86.

called rate books #1, the Chicago Division having in addition a #1A series.[2] Subsequent revisions of books published by each bureau were given the next higher number. By the date of the complaint, the southeastern rate books issued by the Bethlehem Bureau had had their third revision and were in the #3 series;[3] the northeastern books, also issued by the Bethlehem Bureau, their fourth revision;[4] and the western books, issued by the Chicago Bureau, their second revision[5] with the exception of three books, one of which was in its original state and the other two in their third revision.[6]

F. Availability of Books to Non-Members, Public Officers and Others.

At the outset of the service in April, 1930, the freight rate books were made available to non-members[1] at the

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[2] Reiter, Vice President, Universal Atlas (C) Tr. 16877-78.
Com. Ex. 3043: Illinois Book No. 1A; Com. Ex. 3044: Iowa 1A; Com. Ex. 3042: Ohio 1A.
Resp. Ex. 156: Indiana No. 1; Resp. Ex. 157: Indiana 1A.

[3] Com. Exs. 1110 A, C, D, J, O, Y and AA and 994 for Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, Tennessee and North Carolina, respectively.

[4] Com. Ex. 1110 K for Maryland, Delaware and the District of Columbia; Com. Ex. 1110 R for New England; Com. Exs. 1110 S, U, X and EE and 1000 for New Jersey, New York, Pennsylvania, West Virginia and Virginia, respectively.

[5] Com. Ex. 1110 B for Arkansas, E for Illinois, F for Indiana, G for Iowa, H for Kansas, I for Kentucky, L for Lower Michigan, M for Upper Michigan, N for Minnesota, Q for Nebraska, V for North Dakota, CC for Oklahoma, Z for South Dakota, BB for Texas, DD for Wisconsin.

[6] Com. Ex. 1110 P Missouri No. 3, 1110 T New Mexico No. 1 and 1110 W Ohio No. 3.

[1] Early non-member subscribers were Lawrence, Republic, Louisville, Lone Star, Wolverine, Keystone and South Dakota.

same cost as to members, *i.e.*, 3/10 of a mill on 1929 shipments.[2] This policy has never been departed from and books have always been supplied to non-members for a fee.[3]

When the Institute was in its dormant period from 1931 until NRA in 1933, twenty non-member companies subscribed at the rate of ½ mill per barrel based on the previous years shipments.[4] Reiter, questioned as to the relative charge to non-members testified that non-members paid a lower figure than the special dues paid by members because the special dues included services other than the freight rate books.[5]

Immediately upon revival of the Institute in 1933, the trustees decided that the service should be furnished to non-members who had legitimate reasons for asking for it.[6] In May, 1937 the Trustees again decided that the service should be made available to non-member companies and to others

> "* * * at an annual charge of $10.00 for each state or group of states appearing in a single book, providing that the minimum charge for each of the two Freight Rate Bureau offices contributing such service to non-members shall be $50.00 annually."[7]

It has also been the policy of the Institute to supply its books to state and federal officials. At first a fee was

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[2] Resp. Exs. 1374-1377: Correspondence between McConnell and Keystone, 1930.

[3] Reiter, General Manager, The Institute (C) Tr. 4057-58, 16874.

[4] Resp. Ex. 728: Lundborg to Alpha, 3/1/32.
Resp. Ex. 3403 C: Lundborg to Condon, 2/1/32.
Resp. Ex. 3956 A: Lundborg to Tyler, 6/3/32.

[5] (C) Tr. 4058.

[6] Com. Ex. 608 H-O: Trustees' Minutes 8/16/33.

[7] Com. Ex. 628 B: Trustees' Minutes 5/18/37.

charged for the books[8] but the fee was abolished in May, 1937 and books supplied without charge.[9]

G. Use of Institute Books.

The graphic summary (Chart No. V-A) by groups of companies on page 66 shows the use and non-use of the Institute freight rate service. Colored red are the companies that do not receive the books or as to which there is no evidence of receipt. In this are included two companies that at one time received the books but did not at the time witnesses testified for those companies.[1] Colored green are the companies that receive the books and their use or non-use of them is also shown. Evidence as to the different uses to which the books are put by the 49 companies that receive and use them is digested below as well as evidence as to the two companies that formerly used them.

1. Companies Making Little or No Use of the Books

The graphic summary shows a total of 20 companies that compile their own books, that is, the 6 in the group that do not receive Institute books, the 3 that receive but do not use Institute books and the 11 that receive them but only use them for checking and/or looking up points not shown in company compiled books.

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[8] MacFarland, Vice President, Medusa (R) Tr. 31080-81. Com. Ex. 136-3 K-3 L: Trustees' Minutes 5/12/31.

[9] Reiter, General Manager, The Institute (C) Tr. 17126-27. Com. Ex. 628 A-D: Trustees' Minutes 5/18/37.

[1] Dewey: Resp. Ex. 3596 B: Moore to Lundborg 6/6/32 calling off Institute rate service because own is sufficient; (R) Tr. 46702, 47263-65.
Huron: Meyers, Traffic Manager (R) Tr. 33299-300: Received Institute books at one time in the past but no longer does.

		COMPANY	REFERENCE
Companies of Pacific Coast and Rocky Mt. Area No Service	21	Beaver	Tr. 16853
		Calaveras	Tr. 16853
		California	Tr. 42471
		Cowell *	Tr. 16853
		Idaho	Tr. 16853
		Monolith	Tr. 16853
		Monolith Midwest	Tr. 16853,
		Northwestern	Tr. 48116
		Olympic *	Tr. 16853
		Oregon	Tr. 16853
		Pacific	Tr. 16853
		Riverside	Tr. 42879-80
		Santa Cruz	Tr. 16853
		Southwestern (Cal.)	Tr. 16853
		Spokane	Tr. 47657
		Superior, Inc. *	Tr. 43898
		Three Forks	Tr. 16853
		Union	Tr. 16853
		Utah	Tr. 16853
		Washington-Idaho *	Tr. 16853
		Yosemite	Tr. 16853
Do not Receive (Only Use Company Compiled Books)	6	Arkansas	Tr. 46514, 46519
		Dewey	Tr. 47283-65, Resp. Ex. 3596 B
		Huron	Tr. 33526-37
		Marquette	Tr. 14034-36
		Nebraska	Tr. 42048-49
		Oklahoma	Tr. 46514, 46519
No Evidence of Receiving	7	Allentown *	No Evidence
		Castalia	Tr. 47675
		Ford *	No Evidence
		National Portland *	No Evidence
		Republic *	No Evidence
		San Antonio *	No Evidence
		Standard Lime *	No Evidence
Receive - Do not Market Cement	2	Great Lakes	Tr. 36549
		Valley Forge	Tr. 10530, Com. Ex. 3138 C
Receive - Do not Use (Only Use Company Compiled Books)	3	Hawkeye	Tr. 41821-22, 41918-19
		Pearlson	Tr. 34430-31, 34435-36, 34515
		Pittsburgh	Tr. 37709, 37960-61, 37968-70
Receive - Use for checking Company Compiled Books and/or for Looking up Points not Shown in Company Compiled Books.	11	Ash Grove	Tr. 14439-40, 13710-11
		Colorado	Tr. 13899-901
		Consolidated	Tr. 30342-45, Com. Ex. 1001 A-C
		Florida	See Consolidated
		Louisville *	Tr. 13221
		Missouri	Tr. 4913, 37315
		Northwestern States	Tr. 28561-70
		Signal Mountain	See Consolidated
		South Dakota *	Tr. 41671
		Southwestern, Tex.	Tr. 38950
		Trinity	See Consolidated
Receive and Use for One or More of the Following Purposes: (1) By Sales Department (2) By Traffic Department (3) By Shipping Department (4) By Salesmen	38	Aetna	Tr. 30346-48
		Alpha	Tr. 7046, 23234-36
		Bessemer	Tr. 33224, 33358
		Copley	Tr. 6777-79
		Cumberland	Tr. 39992-93
		Diamond	Tr. 47757
		Edison	Tr. 35803, 35808-09
		Federal	Tr. 30714-15
		Georgia	Tr. 37316, 38709, 48102
		Giant	Tr. 37316, 38709, 48104
		Glens Falls	Tr. 47917
		Grain Belt, Pa.	Com. Ex. 898 A
		Grain Belt, W. Va.	Tr. 29408
		Herodes	Tr. 26164
		Hermitage	Tr. 36157, 36343
		Keystone	Tr. 27473-74
		Kosmos	Tr. 36821
		Lawrence	Tr. 21272
		Lehigh	Tr. 30994-98
		Lone Star	Tr. 32772-73
		Medusa	Tr. 40726
		Monarch	Tr. 42196-97
		National	Tr. 39588
		Nazareth	Tr. 28382
		North American	Tr. 7314-15
		Penn-Dixie	Tr. 38157, 38186
		Petoskey	Tr. 36707-08
		Southern States	Tr. 37523, 37613
		Southwestern, O.	Tr. 29163
		Standard	Tr. 37316, 38709, 48106
		Superior	Tr. 29625
		Universal Atlas	Tr. 4034-35
		Valentine	Tr. 5024-25, 5241
		Vulcanite	Tr. 37316, 38709, 48107
		Wabash	Tr. 13843-46
		West Penn	Tr. 27781
		Whitehall	Tr. 38530, 38679-80
		Wolverine	Tr. 30921, 36849-50

* Non-Respondent

The evidence of eight of these companies shows that they have compiled their own books for many years.[2]

a. Rate Books of Companies Using Their Own Freight Rate Compilations

MacDonald of Northwestern States testified that at the time the Institute rate books became available, his company was not certain that the Institute would continue to issue books, and since the company did not want to find itself suddenly without a rate service, it decided to continue to compile its own rates.[1] The task of this company in compiling its own rates was simplified by the fact that its marketing territory falls within the Western Trunk Line territory in which tariffs are simple.[2] In fact eight of the other companies compiling their own books also have

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[2] Dewey: Moore, R. W., Vice President (R) Tr. 46682: For 28 years;
Tyler, President (C) Tr. 14291-93: For 32 years.

Huron: Meyers, Traffic Manager (R) Tr. 33300-01, 33298.

Louisville: Hill, Vice President (C) Tr. 13286-87; for as long as he has been in business (16 or 17 years: Tr. 13283-84).

Marquette: Wecker, President (C) Tr. 14049-50: For at least 25 years.

Missouri: Alexander, President (R) Tr. 37313: At least since he has been with the company (January 1930: Tr. 37085-87).

Northwestern States: MacDonald, B. A. (R) Tr. 36568-69, 36677-78: Since 1919.

Pittsburgh Plate Glass: Letzkus (R) Tr. 37966-68: Ever since he has been with the company (January 1925: Tr. 37682).

South Dakota: Hartley, Sales Manager (R) Tr. 41479-81: Since 1925.

[1] (R) Tr. 36677-78.

[2] Id., Tr. 36693-94.

mills located in Western Trunk Line territory, so that their work in compiling books is to some extent simplified.[3]

Of fourteen books in evidence, or identified, compiled for twelve different companies, eight are similar in set-up to books published by the Institute,[4] two show substantially the same information but differ in set-up from Institute books,[5] and four differ in set-up and information shown.[6]

[3] Com. Ex. 3113: Map showing location of cement plants, 1933. Companies with mills located in Western Trunk Line territory are South Dakota (Rapid City), Dewey (Davenport), Ash Grove (Louisville), Nebraska (Superior), Consolidated (Fredonia), Missouri (Kansas City), Marquette (La Salle), and Hawkeye (Des Moines).

[4] Huron: Resp. Ex. 2380: Page from Lower Michigan book.
Marquette: Com. Ex. 2609: Rate book for State of Illinois.
Northwestern States: Resp. Ex. 2718 A-D: Rate books for North Dakota, Nebraska, Minnesota and Iowa, respectively.
Pittsburgh Plate Glass: Resp. Ex. 2858 A-F: Five pages from Ohio book.
South Dakota (non-respondent): Resp. Ex. 3363: Book for State of South Dakota.

[5] Oklahoma: Resp. Ex. 3578 A-Z67: Rate book for Oklahoma.
Nebraska: Resp. Ex. 3420 A-Z44: Rate book for Nebraska.

NOTE: These books list stations and index them to page of book where they are set up according to the line of railroad on which they are located. Otherwise information given is about the same as that shown in Institute books.

[6] Hawkeye: Resp. Ex. 3405: Page from Iowa rate book. Shows rates and names of dealers at stations listed.
Missouri: Resp. Ex. 2798: Page from Missouri rate book. Shows rate and changes without dates on which quotations were sent to stations listed and amounts of quotations;
Resp. Ex. 2799: Page from Iowa book. Information as above.
Southwestern (El Paso): Resp. Ex. 2968 A-E: Sheets from book for New Mexico, Texas and Arizona. These sheets show changes in rates without dates of change, quotations and dates on which they were sent, and names of dealers located at stations listed.

In general, the Institute books contain rates from more headline points to more destinations than do the company compiled books.[7]

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[7] Compare:

South Dakota Rate Book, Resp. Ex. 3363, 6 headline points and 355 destinations with Institute's South Dakota book, Com. Ex. 1110 Z, 10 headline points applying from 19 producing points to 533 destinations.

Southwestern New Mexico book, Resp. Ex. 2968 A-E, 14 headline points and 27 destinations with Institute's New Mexico book, Com. Ex. 1110 T, 10 headline points applying from 20 producing points to 504 destinations.

Northwestern States, North Dakota book, Resp. Ex. 2718 A, 7 headline points to 736 destinations with Institute's North Dakota book, Com. Ex. 1110 V, 9 headline points applying from 10 producing points to 863 destinations.

Nebraska book, Resp. Ex. 2718 B, 11 headline points to 741 destinations with Institute's Nebraska book, Com. Ex. 1110 Q, 12 headline points applying from 22 producing points to 932 destinations.

Minnesota book, Resp. Ex. 2718 C, 11 headline points to 1086 destinations with Institute's Minnesota book, Com. Ex. 1110 N, 14 headline points applying from 20 producing points to 1436 destinations.

Iowa book, Resp. Ex. 2718 D, 11 headline points to 1398 destinations with Institute's Iowa book, Com. Ex. 1110 G, 12 headline points applying from 24 producing points to 1574 destinations.

Sample pages from the following books:

Nebraska book, Resp. Ex. 3420 listing 60 destinations with Institute Nebraska book, Com. Ex. 1110 Q listing 48 destinations, both in the initial A group.

Missouri book, Resp. Ex. 2798, 18 headline points to 10 destinations with Institute's Missouri book, Com. Ex. 1110 P, 19 headline points applying from 23 producing points to the same number of destination points, shown from "Pitt" to "Pleasant Hill".

Iowa book, Resp. Ex. 2799, 15 headline points to 10 destinations with Institute's Iowa book, Com. Ex. 1110 G, 12 headline points applying from 23 producing points to the same number of destinations.

2. Freight Rate Books and Pricing

a. General

An enumeration of the several uses for the Institute rate books is given in the testimony of Charles Horner, President of Kosmos, as follows:

> "We employ the freight rate books to determine what the rate will be on shipments moving from our mill. We use the information to assist us in determining whether our mill net would be sufficient to make a given piece of business attractive. We use the information in the event of a change in price to assist us in determining whether or not there is a pattern of prices which figure back to some mill as a base plus the freight charges. In the event of a general change in price level, we also use the information in an effort to anticipate the delivered prices at those points where we have not as yet secured specific information as to what destination prices have been quoted."[1]

The evidence shows that the other companies use the books for one or more and sometimes all of these purposes.

Marquette, Illinois book, Com. Ex. 2609, 11 headline points to 148 destinations with Institute's Illinois book, Com. Ex. 1110 E, 14 headline points applying from 17 producing points to 133 destinations, both in the initial letter A group.

Pittsburgh Plate Glass' Ohio book, Resp. Ex. 2858 F, 13 headline points to 88 destinations with Institute's Ohio book, Com. Ex. 1110 W, 32 headline points applying from 33 producing points to the same number of destinations, shown from "Ada" to "Barton".

Huron's Lower Michigan book, Resp. Ex. 2380, 5 headline points to 32 destinations with Institute's Lower Michigan book, Com. Ex. 1110 L, 18 headline points applying from 20 producing points to 39 destinations, both in the initial letter A group.

Hawkeye Iowa book, Resp. Ex. 3405, 10 headline points to 14 destinations with Institute's Iowa book, Com. Ex. 1110 G, 13 headline points applying from 23 producing points to 19 destinations, both shown from "Williamsburg" to "Woolstock".

[1] (R) Tr. 36822, 38758.

Thus 14 companies use the books to check back delivered prices of competitors found in the field to determine the base or bases reflected in such prices;[2] 4 companies use them to determine whether or not their mill net on a prospective sale would be attractive enough to warrant quotation;[3] 20 use them to calculate, figure or quote prices by adding the freight rate to a given base price;[4] 6 companies use them

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[2] Edison: Sweeney, Vice President (R) Tr. 35808-09.
Federal: Bates, J. E., Sales Manager (R) Tr. 30778.
Glens Falls: Titsworth, President (R) Tr. 47917-20, 47938.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29878-79.
Hermitage: McGovern, Sales Manager (R) Tr. 36155.
Kosmos: Horner, President (R) Tr. 36822.
Lawrence: Ackerman, Vice President (R) Tr. 31319-20.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6139-40, 6194-95.
Monarch: Brooke, Vice President (R) Tr. 42386-87.
National: Dannelly, Vice President (R) Tr. 39743-45.
Nazareth: Robeson, Vice President (C) Tr. 4022-23.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38186-88.
Com. Ex. 3135 E: Penn-Dixie answer to F.T.C. questionnaire 7/17/31.
Southern States: Elcock, Vice President (R) Tr. 37613, 37654-55.
Volunteer: Parsons, Sales Manager (C) Tr. 5044-45, 5134-35.
Roberts, Traffic Manager (R) Tr. 31716-21, 31931-34.

[3] Kosmos: Horner, *supra*, Tr. 36822.
National: Dannelly, *supra*, Tr. 39744-45.
Petoskey: Lucas, Vice President (R) Tr. 38758.
Volunteer: Parsons, *supra*, Tr. 5228-29.

[4] Aetna: Calvin, President (R) Tr. 30346-48 tariffs used as primary source.
Alpha: Coogan, Vice President (R) Tr. 23234-36.
Edison: Sweeney, *supra*, Tr. 35808, 35851-52.
Federal: Bates, J. E., *supra*, Tr. 30840-41.
Green Bag, W. Va.: Wood, *supra*, Tr. 29518-19, 29867-68, 29879-80 for points outside its own territory.
Hercules: Brobston, President (R) Tr. 26164.
Com. Ex. 1444: Hercules Instructions 1/24/31.
Hermitage: McGovern, *supra*, Tr. 36164-66.

to aid in anticipating competitors' prices by adding freight to the competitors' last known basing price;[5] 3 companies use them as an aid in quoting prices lower than or at least as low as competitors;[6] 2 use them to meet competitive

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Lawrence: Ackerman, Vice President (R) Tr. 31329-30 for destinations where price is unknown.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6194-97.
Koch, Vice President (R) Tr. 33173-76, 33179-80.
Hogan, President (R) Tr. 34727.
Louisville: Hill, Vice President (C) Tr. 13221-22, 13286-87 for quotations to distant points only.
Nazareth: Robeson, Vice President (C) Tr. 4022-23.
North American: Harte, Vice President (C) Tr. 7514-15.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38170-83, 38186-88.
Wing, Vice President (C) Tr. 8126-27, 8153.
Com. Ex. 3135: Penn-Dixie answer to F.T.C. questionnaire 7/17/31.
Petoskey: Lucas, Vice President (R) Tr. 38758.
Southern States: Elcock, Vice President (R) Tr. 37657-58.
Superior: Davis, President (R) Tr. 29624-25.
Volunteer: Parsons, Sales Manager (C) Tr. 5024-28, 5136.
Roberts, Traffic Manager (R) Tr. 31744-46 to points for which Volunteer has no price cards.
West Penn: McKee, Vice President (R) Tr. 27884.
Whitehall: Elliott, Vice President (R) Tr. 28679-80, 28682-84, since 1933.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36049-51, 36053.

[5] Glens Falls: Tatsworth, President (R) Tr. 47937, 47940.
Kosmos: Horner, President (R) Tr. 36822, 37036-37, 37040.
Lone Star: Hogan, *supra*, Tr. 34727.
Marquette: Wecker, President (C) Tr. 14039-43. The Marquette company uses its own books for similar purposes.
Monarch: Brooke, Vice President (R) Tr. 42391-92.
Petoskey: Lucas, *supra*, Tr. 38758.

[6] Lone Star: Hogan, *supra*, Tr. 34726.
Nazareth: Robeson, *supra*, Tr. 28395-96.
Whitehall: Elliott, *supra*, Tr. 28692-94.

prices;[7] and 2 aid in compilation of price records for the company's use.[8] Five companies use the Institute books solely for the purpose of checking the accuracy of their own company compiled books and do not use them for computing prices.[9]

As shown in Part H C 3 c, *supra*, pp. 227-30, most companies maintain office records of their current delivered prices and use such records for quoting prices. They seldom have recourse to any base plus freight rate calculation in quoting.

The most comprehensive statement of the office use of the rate books was given by F. M. Coogan, Vice President of Alpha, whose company had used its own rate books as early as 1910. His testimony, which he said applied to the Institute books as well as the books Alpha used in 1910,[10] follows in part:

> "Well, everybody, or almost everybody in our sales department uses the freight rate books. They all have them on their desks and they use them from time to time for different purposes.
>
> Starting in with the chief clerk, and the man I call the 'telephone clerk,' and the order boy, and the two men in the order department, the traffic department, they use them, they all use it. * * * I do not want to be understood incorrectly. I want it understood that the traffic department does not use the freight rate books for shipping purposes, they

[7] Volunteer: Roberts, Traffic Manager (R) Tr. 31942.
Whitehall: Elliott, Vice President (R) Tr. 28526.

[8] Lone Star: Koch, Vice President (R) Tr. 33179-80.
Volunteer: Roberts, *supra*, Tr. 31916-20, 31995-97.

[9] Ash Grove: Sunderland, President (C) Tr. 13710-12.
Bessemer: Dankel, Sales Manager (C) Tr. 11351.
Colorado: Warner, Sales Manager (C) Tr. 13899-900.
Huron: Meyers, Traffic Manager (R) Tr. 33299-300.
Missouri: Alexander, President (R) Tr. 37315.

[10] (R) Tr. 23239.

use the tariffs for that purpose, but they do use the freight rate books in order to check their own tariff work.

• • • •

Q. Well, now, as to the freight rate books, take a typical order. Suppose some customer telephoned in and asked you the price for cement delivered in a certain town; does that ever happen? A. Well, it happens sometimes but we are not asked the price very often. I do not think that you gentlemen realize the knowledge that almost everybody has of prices. They have certainly as much and perhaps more than we do, but once in a while your man in the office will be asked to quote a price. Then he gets hold of his freight rate book in order to try to quote a price quickly for he has got to use freight rate books in order to try to quote a price correctly and quickly, and the last being quoted at that destination.

Now, this is used in many ways. Of course, the man at the telephone becomes quite expert. He can almost quote a price at a glance. I think I should state that we have a system of customers' cards which we use and which sometimes he will refer to, but if there is no customer involved at that particular destination, then he will use the freight rate book and he will use his chart which he has. This is a very fast process used by our company, and in that way he will arrive at a price very quickly, and quote the person on the telephone.

Now, the order department will also use that book because that shows the freight rate situation everywhere very clearly and enables them to make use of this as a matter of general information.

Then, it goes into the Traffic Department, and the Traffic Department, while getting the rates and giving the shipping instructions from the railroad tariffs on file in our office, they do check to see that the railroad tariff rates agree with the rates shown in that book.

When an order is taken there, then the order is taken out to the shipping department and is passed on to the shipping department at the mill, and in

case it comes in late at night, it is simply mailed to the mill or confirms telephone orders given earlier in the day, and is mailed to the mill, and the shipping clerk at the mill will make up his bill of lading in accordance with those instructions and he will put the car number on it and send a report of that shipment to our Easton office.

When that report is received, the order, which has already been handled by the order department and traffic department, will be sent to the billing department with the information which they receive from the shipping clerk at the mill, which will enable them to invoice the cement to the customer and mail the invoice to him.

Q. That is a typical order.

Now, are there any occasions when a man who takes an order would not use the freight rate book? A. Yes, sir. I should say seventy-five per cent probably more than seventy-five per cent of our orders, the question of price does not come up, parties just telephone in and say, 'ship so much cement' and in the absence of any advice to the contrary from us, the man who is ordering the cement assumes of course he will get it at the same price as the last cement.'"[11]

b. Use in Connection With Pricing

The deduction of freight rates from competitors' delivered prices found in the field to determine the base or bases reflected in such prices has been referred to fully in connection with "Analysis of Prices" in Part II, Sec. D 5 d, *supra*, pp. 456-70. This evidence will not be reviewed here.

Many companies use the Institute rate book for this purpose.[1]

Thus, Titsworth, President of Glens Falls, testified:

"When our salesmen run into a price change we first try to determine whether it is a local price cut

[11] (R) Tr. 23240-44.

[1] See fn. 2, *supra*, p. 1069.

or a change in price by some competitor. Now, it aids the salesman very materially in checking the matter to have these various freight rates available. It helps us, therefore, in locating the source of the price cut. We have to locate the source of the price cut to know the area that it covers and to make our price accordingly.'"[2]

Wood, General Manager of Green Bag of W. Va., testified that before the Institute published its rate books he had some difficulty in figuring back to find the base point and since then the matter of figuring back has been simplified. This, he said was one of the main advantages of the Institute freight rate books.[3]

Elcock, Vice President of Southern States testified that the Institute rate book——

"* * * is of great use to me when there is a price change out in the field, and we pick up price data; yes, we use that information, checking back on points, but that is the exception, not the rule.

Q. Well, when you use it in that way, you use it to determine what a delivered price is by adding freight under that headline point to what you know to be a base price at some of those points? A. No. I think it is the reverse. I am subtracting from the price which I find the freight rate which is listed in that book to try to ascertain what they are making there at the mill.

* * *

Q. You do not use the book any further? A. We use the book further. I use that book daily if a shipment goes to a point where we do not know the rate, and frequently when we do know the rate. We check ours on that.

Q. It is a matter of checking price; is that correct? A. Well, now, you may want to call it that. It is not a matter of checking prices. It is a matter

[2] (R) Tr. 47937.

[3] (R) Tr. 29878-79.

of checking freights, our use of that book. It is not a matter of checking prices.'"[4]

Neylan, Assistant General Sales Manager of Lone Star, testified that he uses the Institute rate book in figuring back the freight from destination to base points.[5]

J. L. Nelson, Vice President of Wolverine, testified:

"A. We use those books the same as we would use any information that we can gather regarding our competitors. We want to know what their freight rates are to certain destinations, as well as our own. I have always gone on the basis that the more you know about your competitors' business, the better you are off in meeting competition.

Q. Why did you want to know what the freight rates were from your competitors' mills to any particular destinations? A. Why, as I said before, I want to know as much about my competitors as I can, that operate in the territory in which I am operating.'"[6]

Executives of a number of the companies[7] who use the Institute rate books in connection with the calculation of their delivered prices were examined as to the nature of such use. The following are representative samples of this testimony:

Sweeney, Vice President of Edison, testified:

"A. Well, it is convenient in quoting prices at destinations where we had not previously picked up the competitive quotations. After we had picked up a number of those quotations, as I testified, and discovered that they worked back to some constant mill base, we assumed that that mill base is applicable through a certain area. Therefore, with the

[4] (R) Tr. 37613-14.

[5] (C) Tr. 6139.

[6] (R) Tr. 36050.

[7] See fns. 2-9, pp. 1069-71, *supra*.

rate information we have, it is not necessary to check every point in the territory. We have the freight rate.

Q. Do you make your quotations partially on the basis of information that you pick up in the field and partially with the help of the Institute freight rate books? A. Well, we are using a freight rate book, but they do not have to be necessarily The Cement Institute book. Usually, I have been told from those in our organization who know more about the cost of these things than I do, that information in these books and the form it is in is purchased at a price that we could not possibly buy the books for if we put it out ourselves. There is no reason in the world why we have to use these books. We could use the information in some other form."[8]

Titsworth, President of Glens Falls, cross-examined by Commission Counsel and by the Trial Examiner first stated that his company used the Institute rate books not for shipping, but for pricing purposes, but subsequently stated:

"We use it in determining competitive prices; that is all, when we find new prices in the field, and I told you time and time again that is what we use the information for, to find out what our competitor is selling his goods for."[9]

Robeson, President of Nazareth, testified that he did not use the Institute rate books "to quote prices," but that after finding delivered prices in the field and determining the base which has been used, he would add the rate in the Institute rate book to that figure to "anticipate" the delivered price at any point where he did not have specific information and that he would assume his price would be as low as the lowest at that point, although he would have no assurance of it.[10]

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[8] (R) Tr. 35852.

[9] (R) Tr. 47937-40.

[10] (R) Tr. 28422-25.

On the same subject, Browder, Traffic Manager of Penn-Dixie, testified:

> "The sales office uses the freight rate books in calculating the delivered prices where we have established price bases at our mill. They use them in analyzing the prices that they pick up in the field.
>
> Q. Those are competitors' prices? A. That is right, and of course, I might add that they are used in sending out their shipments in meeting competitors' prices."[11]

Wood, General Manager of Green Bag, W. Va. testified that he used the freight rate books to make delivered price quotations. And further:

> "Q. In other words, your method of making up delivered prices is to take the base point that you find prevailing and add the freight in the freight rate book? A. Meeting prices; right.
>
> Q. But that is—if one located where you are adds the freight in the Institute book to the base point in the particular area in which you are selling, you will be meeting competition, as you put it? A. Yes, sir.
>
> Q. It will put you in at the lowest figure? A. Yes."[12]

Elcock, Vice President of Southern States, testified:

> "Trial Examiner Norwood: I am asking you how you use them with respect to making prices and to determining what your competitors' prices are.
>
> The Witness: I take the basing point and I add the freight to the basing point.
>
> Trial Examiner Norwood: The freight shown in the Institute books?
>
> The Witness: Yes, sir; the freight shown in the Institute freight books, because it is a convenient way to get it."[13]

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[11] (R) Tr. 38186-87.

[12] (R) Tr. 29867.

[13] (R) Tr. 37657-58.

McKee, Vice President of West Penn, testified that ordinarily from his experience the probabilities are that the destination price is made up with one of the factors being the rate in the freight rate book.[14]

Roberts, Traffic Manager of Volunteer testified that in his 10 years experience with the exception of arbitraries he did not think he ever found a price at a destination point which was not built up on a base plus the Institute freight rate book.[15]

J. E. Bates, Sales Manager of Federal, testified that "generally speaking" the price at the various destinations in his sales area correspond with the freight rate in the freight rate book, including the correction sheet information plus the controlling base.[16] Continuing:

> "Q. Isn't it a fact that an announcement from the Freight Rate Bureau of The Cement Institute of a change in freight rates is your key to change your prices at destination points? A. If there has been an increase in the rates, certainly we would change our prices.
>
> Q. And isn't it a fact you rely on that—I say, you wait for that announcement even though you had prior knowledge of a change from your traffic department, you would still wait until you get the correction sheet from the Institute? A. Certainly not. We use the correct rate to that destination."[17]

And later:

> "Q. You have reason to believe, from your experience, have you not, that if you quote base plus freight, and use the freight taken from the Institute books in calculating your combination of base plus freight, you will be in the market at the same price

[14] (R) Tr. 27884-87.

[15] (R) Tr. 31934.

[16] (R) Tr. 30825.

[17] Id.

as your competitors? A. Yes, we hope to be, Mr. Paulson; we assume we will be.

Q. You have reasonable assurance that you will be if you do as I say, don't you? A. Yes, if everybody would use the same formula that we use in composing that price, they would be the same."[18]

And again:

[Italicized part quoted in Fdgs. Par. Eight (g)]

["*Q. And hasn't it been your experience that the price at those various destination points in your sales territory always correspond with the freight rate in the freight rate book, including the correction sheet information plus the controlling base? A. Yes, generally speaking, I think you are absolutely right there. It is a pattern that we follow on basing prices, we use our freight rate, we add our package plus that constant figure that we have predetermined.*"][19]

Jennings, former Manager of Southwestern, at Osborn, Ohio examined in the same vein testified:

"Q. Did the desire to figure the same destination prices by using the same freight that your competitor was using enter into your use of the freight rate books at the Institute? A. Well, naturally, we wanted to have the right price, to quote the right prices, that was our business.

Q. In other words, you wanted to have the same destination price as your competitors? A. Well, I suppose so; we didn't want to be higher because we didn't want to lose the business.

Q. And you didn't want to be lower, either? A. We didn't want to be lower."[20]

Sweeney, Vice President of Edison said he uses the rate books mostly for quotation purposes.[21] On the other

[18] (R) Tr. 30840-41.

[19] (R) Tr. 30825.

[20] (C) Tr. 11172-73.

[21] (R) Tr. 35808-09.

hand he said they have nothing to do with meeting competition and added:[22]

> "We meet competition—if you want to meet competition, by finding out what the competitors are quoting in the field. Freight rate books have nothing to do with our meeting competition."

At the outset of the Institute rate service Lone Star placed emphasis upon it because it provided a uniform statement of freight rates. On September 3, 1931, Hogan wrote to Pierson, both Vice Presidents of Lone Star, concerning his valuation of the service. He said:

> "Mr. Koch wrote Mr. Cooper yesterday on the matter of the freight rate service rendered by the Cement Institute, and I believe he sent you a copy of his letter.
>
> **[Italicized part quoted in Fdgs. Par. Eight (d)]**
>
> [*From this you will learn that we in this office feel that the freight service is well worth the money that the Institute charges, in that it has a distinct advantage over any individual company record, because it disseminates freight rate information to practically all of the companies in a given territory, and thereby serves to prevent variations in quotations by the various companies, which might be due entirely to incorrect freight information.*]
>
> If you are still of the opinion that you do not want the freight service may we suggest that you explain your reasons more fully to Mr. Koch."[23]

Pierson, writing to Koch concerning this letter from Hogan, said:

[Italicized part quoted in Fdgs. Par. Eight (d)]

> ["*Our recommendation was based solely in an effort to economize, feeling that we were sufficiently up to date with our rate information; that we should*

[22] (R) Tr. 35208-09.

[23] Com. Ex. 2461.

be able with our present organization, to carry on this work in a reasonably satisfactory way, thus saving the company the cost of this service, which we estimated at $595.00. However, since receiving your letter and Mr. Hogan's letter of the 3rd we have reached the decision that this service is worth all that it costs.] We have, therefore, reversed our decision in agreement, with your thoughts; that we should continue this service, and are so notifying the Institute in New York."[24]

Koch, who at that time was also a Vice President of Lone Star, testified at some length about the use of the Institute rate books by Lone Star and their value to the company.[25] Cross examined regarding the above correspondence he testified "I don't think he [Hogan] stated the policy of the company as I understand it," and further that Hogan "had nothing to do with sales. He looked after checking of costs, or something for the President." And further:

"Q. I call your attention to Commission's Exhibit 2462. Does that refresh your recollection that your vice-president out at Indianapolis wanted to discontinue the service because of the economy, in order to save money? A. Well, Mr. Pierson felt that he would not save money, but my recollection——

Q. Would not save money by doing what?

Mr. Brick: Please don't——

A. By subscribing for these books, according to this letter. But the facts as later shown are clear that he did save money.

By Mr. Wooden:

Q. You do not think Mr. Pierson's judgment as to whether it would save him any money, or his branch of the business any money, was worth con-

[24] Com. Ex. 2462.

[25] (R) Tr. 33163-71, 33131-33, 33157-59.

sidering? A. Oh, a vice-president's judgment is always worth considering, Mr. Wooden. But Mr. Pierson is not a rate man; had no traffic knowledge.

Q. You say that you were not interested in using the freight rate service of the Institute for the purpose of having your delivered prices the same as those of your competitors? A. I wanted to know what it cost to get it there, and what it cost the other fellow to get it there, Mr. Wooden.

Q. Well, you wanted to know the cost of getting it there from other people's mills, didn't you? A. That is right, I so stated.

Q. Didn't you want to know that in order that you might equalize your delivered prices with the delivered prices of your competitors? A. Well, I could equalize that without having a rate.

Q. My question is, didn't you want to have the rate information for that purpose?

Mr. Brick: For what purpose, Mr. Wooden?

Mr. Wooden: In order to enable him to equalize his delivered prices with those of his competitors.

A. It might have that effect, but that was not the purpose.

By Mr. Wooden:

Q. In other words, there is an effect that you did not have in mind even; is that what you mean to say? A. Yes.

Q. Isn't it necessary that all competitors figure, the freight in the same way, in exactly the same way, in order to have an identical delivered price at any destination? A. I would say in order to have an identical price you would have to do something like that, or meet a price, regardless of rates.'"[28]

When the Institute was canvassing the question of extending its rate service to Texas, Neylan, then Assistant General Sales Manager of Lone Star, wrote Ferguson, the

[28] (R) Tr. 33156-59.

company's Vice President at the Dallas office, that he supported the proposition, saying:

[Italicised part quoted in Fdgs. Par. Eight (d)]

["*You have no doubt received copy of letter from G. H. Reiter, Manager Chicago Division of The Cement Institute, which was addressed to Members in District #9. This letter has to do with an assessment to cover the compiling and distribution of freight rates on cement from all points of origin to Texas destinations.*

We know you appreciate the advisability of having freight rates compiled at one central point and issued to all members operating in any given district in order that everyone may be operating on the same rate. This is being followed in practically every other section of the country and we are of the opinion it should be continued in Texas."][27]

Neylan's reproof of the Lone Star agent at Norfolk, Va., for quoting a freight rate not yet published in the tariff and his explanation of his reproof has heretofore been set forth.[28]

Several other witnesses testified on the question as to the use of the Institute books as an identical means for determining the freight factor in prices. Thus, Elliott, Vice President of Whitehall testified:

"Q. Now, you have told us something about your experience back in 1912. Did you or did you not attempt to meet competitive prices back as far as—as long as you have been in the cement business? A. Yes, sir.

Q. Were you able to meet competitive prices prior to the time that you subscribed to the Institute and got the Institute freight rate books? A. Yes, sir.

Q. Any differences as to that at all, as to your ability to meet competitive prices even before you

[27] Com. Ex. 2417.

[28] *Supra*, pp. 1044-53.

got the freight rate books or after you got them? A. No, sir.

Q. I am talking about the freight rate books of The Cement Institute, of course. A. Yes, sir.

Q. Well, if that is so, Mr. Elliott, what is the reason—what is the purpose for you using The Cement Institute freight rate books in your company? A. Well, it is much less cumbersome, it is quicker, it gives us a check against the tariff, it prevents errors."[29]

Horner, President of Kosmos, testified:

"Q. It is a means by which you can anticipate your competitors' prices at particular destinations; is that correct? A. It is a method that helps us to anticipate prices if we do not have any more direct information from the particular point or destination involved."[30]

Brooke, Vice President and Sales Manager of Monarch, testified:

"Q. Now, then, it comes back to this, that you check with the Institute freight rate books just to keep your prices in line? A. No, I would say in order to help us in our competition with other producers.

Q. Well, we are pretty close now. I do not want to attempt to make you adopt my language. You do not check with them principally to get freight rate information to use in shipping your product, do you? A. Well, indirectly, it amounts to that. You are not going to ship it if you do not get the order, and you are not going to get the order unless you successfully compete with other producers, and——".[31]

MacDonald, Vice President of Northwestern States, testified:

"Q. In such cases where you use your freight rate books for the purpose of price computation, are

[29] (R) Tr. 28526.

[30] (R) Tr. 37037.

[31] (R) Tr. 42391-92.

you interested in whether or not your competitors, in using freight rate books in a similar manner, use the same rate as you do? A. No, sir.

Q. You are not interested, then, in whether or not they quote the same price, as you do? A. We are; yes, sir; that is, only to the extent where we are meeting competition and our price is competitive. Any other competitors can quote any price they want.

Q. You are not interested in whether your competitors use the same freight rate as you do, even though they use the same basing-point price as a starting point? A. Mr. MacIntyre, we are not interested—the freight rate of our competitors is of no interest to us. The only interest to us is the price that they use at the destination where we are soliciting business. Now, how they arrive at it, whether they use our rate book or freight rate books, whatever such a structure is, it is of no interest to us, how they arrive at it.

Q. Well, if they arrive at the price, though, in quoting at destination, in the same manner as you do, are you not then interested in their using the same rate and the same base price as you do? A. No.

Q. You do not care if they get a different price than you; is that correct? A. We do not care if their price differs from ours, as long as it is higher than ours.

Q. You are interested, then, as to whether or not it differs from yours, if it is lower; is that correct? A. If it is lower than ours, we are going to find out about it, and meet it; that is all, regardless of how they arrived at it.

Q. But if they arrive at their base in the same manner as you do, you are interested in it, if they are lower than you; is that correct? A. Regardless of how they arrive at it, if theirs is lower than ours, we are interested in it."[32]

G. E. Warren, Vice President of Southwestern, testified that in using Institute books for quoting, he had frequently encountered different destination prices. He said:

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[32] (R) Tr. 36666-68.

"Q. Well, if you and your competitors use them in like manner, for that purpose, is there any chance, in your opinion, of getting different prices at different delivered points?

. . . . .

A. We have found that our quotation at destination has varied.

By Mr. MacIntrye:

Q. Well, I am talking about, though, the freight rate books as used under the circumstances. A. You asked if there was any chance——

Q. As used under the circumstances. A. If there is any chance——

Trial Examiner Norwood: Answer.

A. I will answer that by saying 'Yes'."[33]

Several witnesses were examined as to whether or not the Institute was a factor in the determination of prices because of the Institute freight rates service. Wood of Green Bag, W. Va., testified:

"Q. You said on direct that the Institute had never had anything to do with determining your prices. Let me ask you if that is entirely correct in view of the fact that the Institute supplies you with the freight rates, the books, and they are so closely related to pricing in the cement industry. A. The Cement Institute does not set our price.

Q. No, they do not set your prices. A. No, sir.

Q. I understand you to say that; but you said in answer to Mr. Leisure's question that the Institute had not anything to do with determining your prices. A. They have not.

Q. Well, they supply with you a memorandum whereby you can—— A. Check.

Q. —Check. A. Yes, sir.

Q. Well, it is a little more than check. You can practically determine prices, isn't that true? A. Meet the competition, right.

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[33] (R) Tr. 29366-67.

Q. In other words, you do not independently determine your price, do you? A. It is base plus freight that covers.

Q. And the freight, since the Institute supplies you the freight rate, it is not quite correct that they do not do anything with regard to determining prices, is it? A. Well, we could use the railroad rates.

Q. You could, but you do not. A. No, because they are more complicated.

Q. Yes. A. Hard to figure out.

Q. That was a broad statement, it seemed to me, that the Institute had nothing to do with determining prices, so wouldn't you feel that it is more correct to say that they have something to do? A. No, sir; I would not say that.

Q. You would not say that? A. No, sir."[34]

Ackerman, Vice President of Lawrence, testified:

"Q. Do you consider that you made a fair statement, then, on direct when you said that The Cement Institute had nothing to do with the fixing of prices of cement? A. Yes, sir; I certainly do.

Q. They issue the freight rate books, do they not? A. The Cement Institute publishes the freight rate books; yes, sir.

Q. And your salesmen use the freight rate books in quoting destination prices, do they not? A. They may in some instances.

Q. Well, they do, don't they? A. They do in some instances.

Q. Well, then, the Institute does have something to do with making of prices in the cement industry, does it not? A. Well, if you can say that the paper manufacturer that manufactures the paper that is used in the book has something to do with naming the prices, I will go along and say 'Yes', but I think it is pretty far fetched.

I have denied that The Cement Institute, as far as I know, has anything to do with the making of prices and I don't think they have."[35]

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[34] (R) Tr. 29879-81.

[35] (R) Tr. 31325-26.

Robeson, Vice President of Nazareth, testified that he did not believe that the use of the Institute service lends "stability" to markets or affects them in any way. And further:

"Q. Doesn't the freight service lend stability to the markets? A. No, I don't feel that a freight rate book is anything other than a compilation of information that is in the tariff.

Q. Well, I agree with you as to what it is.

I am asking you, doesn't the service lend stability to the cement market, the market for cement? Isn't it your experience that it does that? A. No. In other words, the stability of the cement market——

Q. Doesn't it tend to throw instability into the market? A. No, I do not think it does.

Q. It does not affect it in any way? A. I do not believe it does.

Q. Do you think if there were not any in existence,—those freight rate books—those market prices would be as stable as they are now? A. I would say you would still have a situation——

Q. Now, answer that question: Would you say that they would be as stable as they are now? A. You keep using the word 'stability'. I am talking about a market at the point where we, as the Nazareth Cement Company, we will meet the lowest price of a competitor.

Q. And by 'stability' I mean absence of fluctuation in prices at those destination points. A. Well, that word 'stability', as you use it, gets you into the field of economics.

Q. Do you think that you and your competitors would submit as many identical bids if the freight rate books were not available to you? A. I do honestly believe so, yes.

Q. In other words, if you figured your freight rate independently, and Alpha figures its independently, and Lehigh figures its independently, the chances are that you would all figure the same freight rate? A. Coming off the tariff, you are bound to. It is a matter of multiplication.

Q. Have you ever tried to figure a rate from a railroad tariff? A. Have I? No, but we have trained people that do it. I have not personally, no."[86]

[Italicized part quoted in Fdgs. Par. Eight (d)]

Commission counsel were interested in developing that the Institute Freight Rate Books were "price books". To that end Com. Ex. 3200 was introduced, being correspondence in 1918 between Swett, Eastern Sales Manager of Lehigh, and Gaines the then Vice President of the Cement Manufacturers Protective Association, respecting the books published by that Association. Swett asked for an "*extra copy of the 'West Virginia price book'.*" Gaines replied:

["*Responding to your letter of July 1st, File 65414-C we are sending you under separate cover a copy of West Virginia Rate Book, which I take it is what you want.*

In your letter you request a price book, which is no doubt a typographical error, inasmuch as you are aware of the fact that this Association does not issue any books in any way connected with price matters."] (Com. Ex. 3200)

Sweeney of Edison was cross-examined on this aspect as follows:

"Q. Well, in a sense, the freight rate books that you now have are—well, are price books, are they not? A. No, sir; absolutely not.

Q. I don't mean to say—— A. Absolutely not.

Q. I don't mean to say—there isn't a price printed in the book, is there? A. I wouldn't consider the freight rate books are price books any more than I would consider a list or books that we might prepare in our own organization would be.

Q. They do not carry any prices? A. Many elements enter into price, and certainly freight is only one of those elements.

Q. Yes, but, as I understood your direct testi-

[86] (R) Tr. 28431-32.

mony, your destination price is freight rate added to the base,—isn't that what you told us? A. Not always.

Q. Except in the arbitrary zones. A. Our destination price, as far as my company is concerned, our destination price is the lowest price that we find at that destination quoted by the competitor.

Q. Well, let us not be too technical. Isn't it your experience that destination price, except for the arbitrary zones at the various destination points that you sell cement, is the freight plus base? A. We have found that so, generally.

* * *

Q. Now, then I say, in view of that fact, it is safe to say then, generally, a freight rate book is a price book? A. No, no, not in my opinion. We have never considered it as such; we don't recognize it as such * * * I don't know how in the name of common sense anybody could construe a freight rate book as a price book."[37]

In the same vein was the evidence given by Simpson, an I.C.C. Rate Clerk, offered by the Commission. Simpson encountered Clous, the Assistant Traffic Manager of Lehigh, in the offices of the Interstate Commerce Commission during the hearings in this proceeding and according to Simpson a conversation between them ensued as to which Simpson testified:

"A. I got to talking to him about the cement industry, in a general way, and about the Cement Institute, of which I frankly knew nothing. I asked him the function of The Cement Institute. He said it was a traffic bureau for the bureau.

I said, 'Do they audit traffic bills?'

He said, 'Oh, no, that is done by the individual lines—individual industries,' I should say. He said, 'The only purpose of The Cement Institute is to issue these rate books which serve as price books'."[38]

[37] (R) Tr. 35809-10.

[38] (C) Tr. 19209-10.

The Trial Examiner asked Elcock of Southern States if he would not add the freight shown in the Institute rate book to a base to quote a delivered price at a point where he had no specific knowledge of the delivered price. He answered:

> "The Witness: No, sir. I use that only as a convenience. Those freight rate books, Your Honor, have nothing whatsoever to do with the price of cement. Anybody that thinks that is off on a wrong track.
>
> Trial Examiner Norwood: Figuring the delivered price?
>
> The Witness: They have nothing to do with the price, as such. They are not a subterfuge to maintain any price."[39]

Witnesses for companies which compiled their own freight rate books testified that they used them for the purpose of shipping and figuring destination prices. Thus R. W. Moore, Vice President of Dewey, testified that the sales department "use them in figuring prices, ascertaining what price they will quote."

> "Q. In that connection do your compilations show the rates from competitive mills to destinations? A. Yes, sir; as well as from our own mills."[40]

E. E. Hartley, the Sales Manager of South Dakota, the state-owned, non-respondent manufacturer, stated:

> "Q. You told us when you were here before that you had your own books, Mr. Hartley. How long have you had those books? A. Since 1925.
>
> Q. What do you need this freight rate information for? A. We need it in quoting prices, in making up delivered prices. We need it for use in our billing and in our invoicing. We need it for our bill of lading."[41]

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[39] (R) Tr. 37656-57.

[40] (R) Tr. 46685.

[41] (R) Tr. 41481.
See also W. A. Wecker, President, Marquette (C) Tr. 14037.
M. M. Alexander, President, Missouri (R) Tr. 37314.

Of the two companies, formerly but no longer receiving the Institute service, the Traffic Manager of Huron used the alphabetical list of stations contained therein and transferred rates figured by himself from tariffs to this list.[42] He also used Institute books when, from checking prices found in the field, he found variances in rate factors used by competitors. Under such circumstances, he would recheck his own rates against official tariffs and if his rates checked, he would then look at the Institute books which he regarded as just another interpretation of rates. He never changed his own rates to conform to those shown in the Institute books.[43] The other company, Dewey, used Institute books only occasionally as a check against its own books to see that its interpretation of tariffs was as good as that of the Institute.[44] With its own compilations made by a traffic department, consisting of a traffic manager and assistant and from one to four clerks, it did not feel that the Institute rate books were necessary in its business[45] and so discontinued its subscription in February, 1932.[46]

c. Use of Freight Rate Books by Salesmen

The practice among cement manufacturers of distributing freight books to salesmen is not uniform and the instructions as to the use of such books by the salesmen who do receive them is not uniform. Some respondent com-

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[42] Meyers (R) Tr. 33300, 33526.

[43] Id., Tr. 33305-07, 33526-27.

[44] Moore, R. W., Vice President (R) Tr. 46694.

[45] Id., Tr. 46682-83, 46701.

[46] Id., Tr. 46702, 47263-65.
Resp. Ex. 3596 B: Moore, R. W., Vice President, Dewey to Lundborg, Secretary, The Institute 6/6/32 cancelling subscription.

panies who received the books testified that they do not distribute them to their salesmen.[1]

Alpha has distributed freight books to its salesmen since it began the compilation of its own rate book in 1910. Coogan gave the following detailed explanation of the salesmen's use of the book:

> "A. The salesman carries with him the freight rate book, but a good salesman would probably know what prices we were quoting delivered in every town where he might have a customer and the only time that that particular salesman would use the freight rate book would be in case he might be asked to quote at a point at which he did not have a customer. Then he would have to use his freight rate books.
>
> He also uses his freight rate books in case we make any change in our prices. When we do, he is notified; that is, we notify him of the change in the basing point which we are using, then he has to take his freight rate book and figure up his new delivered prices.
>
> Now, we used to call upon ourselves to do a lot of work when we did that. We used to, when we first starting using destination prices, we used to furnish our salesmen with a list of prices to points in his territory, but in the event we decided to change our price, there would always be a lapse of several days before the salesmen would be advised of the changes in that territory, as we would have to send out new quotations and it is sometimes several days before

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[1] Dankel, Sales Manager, Bessemer (C) Tr. 11132-33.
Warner, Sales Manager, Colorado (C) Tr. 13899-900.
Storey, Vice President, Florida, Trinity, Signal Mountain, President Consolidated (R) Tr. 47588, 47614.
Tyler, President Dewey (C) Tr. 14293.
Russell, Vice President, Peerless (R) Tr. 34515.
Moore, H. H., Secretary-Treasurer, Superior (R) Tr. 29688.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35920-21.

And also the following companies which compiled their own books:
Moore, R. W., Vice President, Dewey (R) Tr. 46728-29.
Alexander, President, Missouri (R) Tr. 37333.

we got down to the point of making up the new price list for each of the salesmen, and it would be several days more before it reached him so that we have found that with the use of the freight rate book, we can keep our salesmen in the field more fully and more promptly advised than we can in any other way.

Q. Now, I assume that your salesmen call on numerous customers in a day? A. Yes.

Q. When a dealer asks a price of cement to be shipped the following week, let us say, does your salesman compute the price on the cement with this freight rate book, Mr. Coogan? A. No, as I have said before, if he is a good salesman when he goes into a man's office, he knows what his price is at that particular destination, and if the dealer wants him to name the price for shipment next week or the week after, he will name it very quickly. As a matter of fact, the dealers know the prices of cement just about as well as the salesmen and they do not ask the price, generally speaking. The price of cement is known by every dealer and a good many consumers and a good many other people.

* * *

Q. Then, as a matter of ordinary routine, does the salesman use the freight rate book every day in quoting prices? A. No, I do not think that the salesman uses it every day, he uses it only when he is asked to quote at some place he has not heretofore quoted or where we advise him of a change in our prices up or down.

Q. Following up Mr. MacIntyre's question of a moment ago, what you have said about the freight rate books, does that apply to the Institute freight rate books as well as to your previous books, or is there a difference? A. That applies to any freight rate book that you might be using.

Q. Now, I understood you to say a moment ago, that the salesman might use it to quote at a place where he did not have a customer. Would you explain what you mean by that or is that what you said? Maybe I misunderstood you. A. Where he had not previously, I might have said that, but I

would say that what I mean is where he previously had not had a customer, of course, there are potential customers in every town; or, a dealer might say, 'Give me a price at such and such a place.' A dealer at one point might ask the man, might ask our salesman for a price for delivery at another place, for delivery of cement at a different point from where the dealer is located in which the salesman had not previously quoted a price, and he might use the freight rate book; in fact, he would very likely use the freight rate book in such a case as that."[2]

Bowen, Vice President of Lehigh, describing the use made of Institute books by salesmen who carried them and the company's reason for not issuing them to some salesmen, testified:

"A. In the cases where we do supply them to the salesmen they use them for the purpose of figuring prices in their respective territories.

Q. When are they not? Under what circumstances are they not used, Mr. Bowen? A. Oh, a great many of our salesmen cover only one or two towns, or cover a comparatively small territory in which they know substantially all of the prices obtaining in their territory without having to do any figuring. Even in the case of salesmen who cover a larger territory it seems that it is just more convenient to the salesmen and ourselves to give him a list of our prevailing prices in his territory."[3]

Also on this point Twamley, Vice President of Coplay, testified:

"Q. How many of them do? Which ones? A. I could not give you a definite answer. I know that the men that canvass the city here, the Metropolitan District, have no freight rate books. You put them up in the woods.

Q. You don't use them here where the arbitraries are in effect? A. Yes, sir; they are of no use.

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[2] (R) Tr. 23236-39.

[3] (R) Tr. 26999.

[Italicized part quoted in Fdgs. Par. Eight (d)]

[*Q. Where your salesmen do carry them, do they use them to calculate the delivered price at the different destinations? A. Presumably they do, but it is understood that all quotations are to be confirmed at the office.*

Q. You supply them with the freight rate books so that they may use them for that purpose? A. Yes, sir.]

Q. Why do you have the salesmen's quotations confirmed? Is that in order to make sure that they make the correct calculations? A. Well, that is one reason, and then there is another. We want to know what they are doing, we want to know what our commitments are."[4]

As to their use by the salesmen of Edison, Sweeney, its Vice President, testified that the freight rate books are convenient for the salesmen and that:

[Italicized part quoted in Fdgs. Par. Eight (d)]

["*Q. Of what value are any of these freight rate services to you? A. Well, they are only valuable in so far as they are—the books are convenient. The rates are shown in a form that we use them in our business, and they are convenient.*

Q. And convenient for what, Mr. Sweeney? A. For the salesmen who carry them for their particular territories—they can carry them a whole lot more conveniently than they could a long list of freight rates which we might prepare and furnish to them.

Q. You use them mostly for quotation purposes? A. That is all."][5]

Some salesmen carry lists of basing points and are instructed to use them as the points from which to calculate prices by the addition of freight rates shown in the books issued to them. Thus Parsons, Sales Manager of Volunteer,

[4] (C) Tr. 6777-78.

[5] (R) Tr. 35807-08.

said that their salesmen "have freight rate books and they figure general prices at the destinations in question." By freight rate books he referred to the Institute books.[6]

There is evidence that twenty-four companies issued Institute rate books to their salesmen,[7] and that at least

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[6] (C) Tr. 5047-48.

[7] Alpha: Coogan, Vice President (R) Tr. 23234-40.
Postelle, Sales Manager (R) Tr. 25433-36.
Fellows, Sales Manager (R) Tr. 25823.
Coplay: Twamley, Vice President (C) Tr. 6777-78, some only.
Edison: Sweeney, Vice President (R) Tr. 35807-08.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29408-09.
Hercules: Brobston, President (R) Tr. 26164.
Hermitage: McGovern, Sales Manager (R) Tr. 36345, 36440.
Keystone: Scott, H. M., President (R) Tr. 27474.
Kosmos: Horner, President (C) Tr. 36821.
Lawrence: Ackerman, Sales Manager and Vice President (C) Tr. 7126-27, 31324-25 (some only).
Lehigh: Bowen, Vice President (R) Tr. 26999 (some only).
Lone Star: Lehaney, Vice President (C) Tr. 14447-51.
Koch, Vice President (R) Tr. 32772-73.
National: Dannelly, Vice President (R) Tr. 39745-46.
Nazareth: Robeson, Vice President (R) Tr. 28382 (some only).
North American: Harte, Vice President (C) Tr. 7514-15 (some only).
Penn-Dixie: Wing, Vice President (C) Tr. 8076-77 (some only); Com. Ex. 3135: Penn-Dixie answer to F.T.C. questionnaire 7/17/31.
Petoskey: Lucas, Vice President (R) Tr. 38757.
Southern States: Elcock, Vice President (R) Tr. 37527, 37622-23 (one salesman out of five).
Southwestern: Warren, G. E., Vice President (R) Tr. 28800.
Universal Atlas: Stone, Vice President (R) Tr. 35124.
Volunteer: Parsons, Sales Manager (C) Tr. 5047-48, 5249.
West Penn: McKee, Vice President (R) Tr. 27751.
Whitehall: Elliott, Vice President (R) Tr. 28527 (some only).
Wabash: Carmichael, Investigator, F.T.C. (C) Tr. 13543-44; Com. Ex. 896 A: Davison Coke & Iron to Reiter, August, 1933 as to Green Bag, Pa.

one company issued its own books to salesmen.[8] Of these companies which issued Institute books to salesmen at least 22 also issued lists of price bases which the salesmen could use in conjunction with the books in calculating the delivered price at points where they might be required to quote and where the price was unfamiliar to them.[9]

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[8] MacDonald, Vice President, Northwestern States (R) Tr. 36570-71.

[9] Alpha: Coogan, Vice President (R) Tr. 23236-39.
Fellows, Sales Manager (R) Tr. 25823.
Coplay: Twamley, Vice President (C) Tr. 6779.
Edison: Sweeney, Vice President (R) Tr. 35807-08.
Hercules: Brobston, President (R) Tr. 26164.
Keystone: Scott, H. M., President (R) Tr. 27473-74.
Kosmos: Horner, President (R) Tr. 36821-22.
Lawrence: Ackerman, Sales Manager (C) Tr. 7126-27.
Lehigh: Bowen, Vice President (R) Tr. 27202.
Lone Star: Koch, Vice President (R) Tr. 32772-73.
Lehaney, Vice President (C) Tr. 14456-63.
National: Dannelly, Vice President (R) Tr. 39745-46.
Nazareth: Robeson, Vice President (R) Tr. 28395-96.
North American: Harte, Vice President (C) Tr. 7514-15.
Peerless: Carmichael, Investigator, F.T.C. (C) Tr. 13566-67.
Penn-Dixie: Wing, Vice President (C) Tr. 8076-77.
Petoskey: Lucas, Vice President (R) Tr. 38757.
Southern States: Elcock, Vice President (R) Tr. 37655-57.
Southwestern: Warren, G. E., Vice President (R) Tr. 28799-800.
Volunteer: Parsons, Sales Manager (C) Tr. 5047-48.
Wabash: Carmichael, Investigator, F.T.C. (C) Tr. 13543-46.
West Penn: McKee, Vice President (R) Tr. 27706-07, 27751.
Whitehall: Elliott, Vice President (R) Tr. 28527-29.

Some companies supply their salesmen with lists of delivered prices,[10] and other companies supply price lists and also books.[11] One company does not supply books, but supplies salesmen with base price lists and lists of rates to points in their respective territories—a distinctive rate book for each salesman—the rates being taken from the tariffs or the Institute books.[12] Instructions as to the use of these rate books by the salesmen vary with the different companies. Thus salesmen of some companies are expected, when occasion arises, to use the rate book to figure destination prices;[13] to assist them in checking competitive

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[10] Arkansas and Oklahoma: Resp. Ex. 3577 A-Z24: Salesmen's list for State of Oklahoma.
Dewey: Tyler, President (C) Tr. 14293.
Moore, R. W., Vice President (R) Tr. 46728-29.
Florida, Trinity, Signal Mountain: Storey, Vice President and President, Consolidated (R) Tr. 47588, 47614.
Medusa: Dawson, Vice President (R) Tr. 40065.
Nebraska: Resp. Ex. 3424 H-P: Salesmen's price list for State of Nebraska.
Superior: Moore, H. H., Secretary-Treasurer (R) Tr. 29624-25.

[11] Coplay: Twamley, Vice President (C) Tr. 6785-86.
Lehigh: Bowen, Vice President (R) Tr. 26999.
North American: Harte, Vice President (C) Tr. 7514-15 (where arbitraries are in effect).
Southern States: Elcock, Vice President (R) Tr. 37527-28.

[12] Dankel, Sales Manager, Bessemer (C) Tr. 11330-33, 11351.

[13] Alpha: Coogan, Vice President (R) Tr. 23236-37.
Fellows, Western Sales Manager (R) Tr. 25823.
Coplay: Twamley, *supra*, Tr. 6777-79.
Edison: Sweeney, Vice President (R) Tr. 35807-13.
Hercules: Brobston, President (R) Tr. 26164.
Keystone: Scott, H. M., President (R) Tr. 27473-74.
Lawrence: Ackerman, Sales Manager (C) Tr. 7126-27.
Lehigh: Bowen, *supra*, Tr. 26999.
Lone Star: Lehaney, Vice President (C) Tr. 14447-51.
Koch, Vice President (R) Tr. 32772-73.
North American: Harte, Vice President (C) Tr. 7514-15.

prices they find in the field at the time of price changes,[14] and to enable them to know their own freight from mills to destination.[15]

Because salesmen of most companies are thoroughly familiar with delivered prices in their territories, most salesmen have little if any occasion to refer to their rate books in quoting prices.[16] Usually customers are also famil-

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Penn-Dixie: Wing, Vice President (C) Tr. 8154: to help them determine market price.

Southern States: Elcock, Vice President (R) Tr. 37622-25, 37655-57.

Volunteer: Parsons, Sales Manager (C) Tr. 5047-49 (by adding freight to governing base).

Roberts, Traffic Manager (R) Tr. 31935-36.

Wabash: Carmichael, Investigator, F.T.C. (C) Tr. 13543-44.

West Penn: McKee, Vice President (R) Tr. 27751.

Whitehall: Elliott, Vice President (R) Tr. 28527 (to help salesmen).

[14] Edison: Sweeney, Vice President (R) Tr. 35809-13.

Green Bag, W. Va.: Wood, General Manager (R) Tr. 29408-09.

Lawrence: Ackerman, Vice President (C) Tr. 31324-25.

Lone Star: Lehaney, Vice President (C) Tr. 14447-51.

Koch, Vice President (R) Tr. 32772-73.

Southern States: Elcock, *supra*, Tr. 37622-25, 37654-55.

[15] Lawrence: Ackerman, *supra*, Tr. 31324-25.

[16] Alpha: Coogan, Vice President (R) Tr. 23236-37.

Lawrence: Ackerman, Sales Manager (C) Tr. 7126-27 (occasionally).

Lehigh: Bowen, Vice President (R) Tr. 26999, 27202.

Lone Star: Lehaney, *supra*, Tr. 14456-63.

Koch, Vice President (R) Tr. 32772-73.

Volunteer: Parsons, *supra*, Tr. 5050 (recalls no instance).

Whitehall: Elliott, *supra*, Tr. 28527.

iar with prices.[17] Quotations by salesmen of at least several companies are subject to confirmation by their home office.[18]

3. Use of Freight Rate Books for Shipping Purposes

Many companies use the rate books in their traffic departments.[1] Commission Counsel, however, introduced testimony reported below intending to establish that the books were inadequate for such a purpose in that they contained no information concerning rail routes, minimum car weights and switching charges.

a. Routing

There are of course many possible routes for almost any shipment. R. W. Moore, Traffic Manager of Dewey, stated "it is impractical to have a freight rate compilation showing the routings for the reason that from our Davenport mill alone there are over 8,000 available routes to destinations in that mill's territory",[1] and Cole, Traffic

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[17] Coogan, Vice President, Alpha (R) Tr. 23239-40.
See also Part II, Sec. C 3 b, *supra*, pp. 220-27.

[18] Postelle, Sales Manager, Alpha (R) Tr. 25434-36.
Twamley, Vice President, Coplay (C) Tr. 6777-79.
Koch, Vice President, Lone Star (R) Tr. 32772-73.

[1] Dewey: Moore, R. W., Vice President (R) Tr. 46730.
Green Bag, W. Va: Wood, General Manager (R) Tr. 29856-59.
Hawkeye: Manley, General Manager (R) Tr. 41915.
Hermitage: McGovern, Sales Manager (R) Tr. 36157-62.
Lone Star: Koch, *supra*, Tr. 33134-35.
Medusa: Cole, Traffic Manager (R) Tr. 40746.
Monarch: Brooke, Vice President (R) Tr. 42384.
Nazareth: Robeson, Vice President (R) Tr. 28433-34, 28437-40.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38195-96.
Petoskey: Lucas, H. H., Vice President (R) Tr. 38709-10.
Superior: Davis, President (R) Tr. 29624-25.
Volunteer: Roberts, Traffic Manager (R) Tr. 31744-45.
West Penn: McKee, Vice President (R) Tr. 27884-85.

[1] (R) Tr. 46693-94.

Manager of Medusa said, "Take the State of Ohio, and to one point at destination, Cincinnati, from Bay Ridge. There are over 20 routes, and assuming that there are over 1,700 points of destination in Ohio, my guess, Your Honor, would be that the book would be too voluminous to handle."[2]

Not all possible routes carry the lowest rate, and if a shipment is rendered to a railroad with a rate stated the railroad must forward by a route that will protect that rate provided the railroad is a party to that rate. If not the railroad must notify the shipper and he may change the rate or tender it to another carrier.[3]

Carriers may and frequently do, publish the same rates as competing carriers, although the fact that one carrier publishes a rate does not mean that it will apply over the rails of another carrier unless the latter has published the same rate.[4]

Simpson, a Rate Clerk of the Interstate Commerce Commission, and called as a witness for the Commission, stated that from his experience "it is impossible to tell the charges to be paid on a specific shipment until such time as the route which that shipment is tendered by the shipper is known."[5] But Simpson later testified, "if he (the shipper) wants the lowest rate, he should be careful to select that carrier, or one of those carriers, which offers the lowest rate in his tariff. It is not necessary that he

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[2] (R) Tr. 40743.

[3] Moore, R. W., Vice President, Dewey (R) Tr. 46693.
Simpson, Rate Clerk, I.C.C. (C) Tr. 48467-68.
Cole, Traffic Manager, Medusa (R) Tr. 40751.
Robeson, Vice President, Nazareth (R) Tr. 28437-40.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38198-99, 38477.
Roberts, Traffic Manager, Volunteer (R) Tr. 31926-27.

[4] Simpson, *supra*, Tr. 9455-56.

[5] (C) Tr. 9370.

specify the routing, providing he selects the proper initial carrier.'"[6]

Recalled, and questioned further as to whether it is necessary for the shipper to specify a route, Simpson testified:

> "Q. Mr. Simpson, if the shipper includes the rate on the bill of lading, does he need to specify the route, then? A. If the shipper shows a rate of a given number of cents, and there is in connection with that carrier to which the shipment is tendered, as an initial line, a rate of that amount on one or more routes, it is the duty of the carrier to transport the shipment via one—by one of those routes.
>
> Q. What happens, Mr. Simpson, if there is not a rate? A. If the shipper tenders a bill of lading and a shipment and the bill of lading bears a rate which the agent cannot check, it is his duty, as he finds in several decisions of the Commission, to notify the shipper that he is unable to check that rate by any route, and to ask for further instructions.'"[7]

It was the experience of R. W. Moore, Vice President of Dewey, operating in the Kansas-Nebraska area that rates between given points are invariably the same over all available routes and that this is true even though there might be any where up to 12 routes.[8] It was also the experience of Cole, Traffic Manager of Medusa that where there are alternate routes, rates were the same and his company did not have to insert routing information on the bills of lading to secure the lowest rate.[9]

If a railroad to whom shipment is tendered at a stated rate cannot protect that rate but nevertheless handles the shipment the shipper is protected on the lower rate specified since the obligation rests upon the raliroad not to

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[6] (C) Tr. 9436.

[7] (C) Tr. 48467-68.

[8] (R) Tr. 47255-58.

[9] (R) Tr. 40728-30.

execute any bill of lading containing provisions it is incapable of fulfilling. The correct practice of the railroad is to refuse to ship rather than to ship at its higher rate and attempt to collect from the shipper,[10] or to turn the shipment over to a road that can handle it.[11] Thus companies who do not always insert routing information on their bills of lading state that it is not necessary to do so, to be protected on the lowest rate.[12] A company need specify only the rate and the road on which the destination is located and no intermediate routing need be specified.[13]

Many of the companies do show traffic routing on their bills of lading.[14] Their reasons for inserting routing instructions are service to the customer in expediting ship-

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[10] Koch, Vice President, Lone Star (R) Tr. 33135, 33137-38.
Roberts, Traffic Manager, Volunteer (R) Tr. 31999-2001.

[11] Roberts, *supra*, Tr. 31926-27.

[12] Moore, R. W., Vice President, Dewey (R) Tr. 46693.
Koch, Vice President, Lone Star (R) Tr. 33137-38.
Cole, Traffic Manager, Medusa (R) Tr. 40730.
Lucas, Vice President, Petoskey (R) Tr. 38710.
Roberts, *supra*, Tr. 31757-59.

[13] McGovern, Sales Manager, Hermitage (R) Tr. 36157-62.
Koch, *supra*, Tr. 33134-35.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38197-98.

[14] Green Bag, W. Va.: Wood, General Manager (R) Tr. 29856-59.
Hermitage: McGovern, *supra*, Tr. 36157-62.
Lone Star: Koch, *supra*, Tr. 33134-35.
Medusa: Cole, *supra*, Tr. 40729-30.
Nazareth: Robeson, Vice President (R) Tr. 28437-40.
Penn-Dixie: Browder, *supra*, Tr. 38197-98.
Petoskey: Lucas, H. H., *supra*, Tr. 38709-10.
Superior: Davis, President (R) Tr. 29626-27.
Volunteer: Roberts, *supra*, Tr. 31927-29.
West Penn: McKee, Vice President (R) Tr. 27947.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35921.

ment to destination in the quickest possible time,[15] specific requests of customer to route shipments a particular way,[16] and need of shipper to locate shipment on route or to trace it for expedition.[17] This practice causes companies no difficulty because shipments are of a repeat nature and are being delivered to the same destinations day in and day out so that a traffic man carries the routes in his head.[18] Traffic men consult tariffs for routes only two or three times a month or secure routing information by looking up railroad guides such as the N. Y. Central Tariffs and Routing Guide and picking the shortest route,[19] or by looking at a railroad map.[20]

Penn-Dixie uses the Institute books together with official tariffs for routing, knowing that the rate given in the book is the lowest. Its traffic men merely check the tariff until they have found a route producing that rate.

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[15] Hawkeye: Manley, General Manager (R) Tr. 41825.
Hermitage: McGovern, Sales Manager (R) Tr. 36397-98.
Medusa: Cole, Traffic Manager (R) Tr. 40727, 40730.
Volunteer: Roberts, Traffic Manager (R) Tr. 31927-29.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35921.

[16] Roberts, *supra*, Tr. 31950.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 29856-59.
McGovern, *supra*, Tr. 36397-98.

[17] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38197-98.
Cole, *supra*, Tr. 41406-07.

[18] Moore, Vice President, Dewey (R) Tr. 46730.
McGovern, *supra*, Tr. 36390-91, 36396-99.
Brooke, Vice President, Monarch (R) Tr. 42335.
Robeson, Vice President, Nazareth (R) Tr. 28433-34.
Nelson, J. L., *supra*, Tr. 35921.

[19] Wood, *supra*, Tr. 29856-59.
McGovern, *supra*, Tr. 36402-04.
Brooke, *supra*, Tr. 42335.
Nelson, J. L., *supra*, Tr. 35921.

[20] Roberts, *supra*, Tr. 31927-29.

By so using the Institute books its traffic men save one half of their time in the East where the average number of available routes is two, five-sixths of their time in the South where the average number of available routes is six, and three-fourths of their time in the West where the average number of available routes is four. As a usual practice, a traffic man finds the lowest rated route on the first investigation.[21]

In the southeast rates are blocked on a mileage basis. Shipments can be routed at fifteen cents a barrel on any route up to 300 miles. It makes no difference whether there are alternate routes since a shipment can be sent by any route as long as it does not exceed the maximum mileage the rate covers. The only question arises where there is more than one railroad serving the mill and the destination is local to only one of the roads. In such case the shipper must submit the shipment to the road on which the destination lies. One road will not accept a shipment for a destination local only to another road serving the same point of origin.[22]

Medusa has prepared from official tariffs route books and route cards for shipments to destinations in its territory.[23] If Medusa did not have information in this form its traffic department would require additional help because it would have to get the information together from the tariffs each time.[24]

Hawkeye has had a practice of long standing of compiling route information secured from tariffs to destina-

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[21] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38194-96.

[22] McGovern, Sales Manager, Hermitage (R) Tr. 36391, 36393-95.

[23] Cole, Traffic Manager, Medusa (R) Tr. 40727-35.
Resp. Ex. 3202 A-E: Sandusky Cement Company's Route Book.
Resp. Ex. 3203 A-D: Medusa's Route Cards from Bay Bridge to Cincinnati, Chillicothe and Dayton, Ohio.

[24] Cole, *supra*, Tr. 41407-08.

tions in alphabetical order. In its day to day business it uses this list and has seldom had occasion to make changes in routes listed.[25]

Simpson testified: "There may be as many as a thousand rates between any one point, and the selection of the proper rate is a matter for an expert, and even the expert may make a mistake." He went on then to describe the service of traffic auditors who audit traffic bills for shippers to see whether they did secure the lowest rate which the road to whom the shipment was tendered could protect. The freight rate book served the shippers as an expert audit of the rates, although not of the shipment.[26] Thus Hayghe, Chief of Traffic Section, Procurement Division of the United States Treasury Department, called by the Commission as a witness, testified:

> "I might have, through setting of certain tariffs, determined that there was a certain rate in effect between points A and B via a given route of carriers. Should the fact come to my notice, either through a publication of this sort (the rate books) or from some other source, that indicated there was in effect between those same two points a rate which was lower than the one I checked, it would give me a hint to look still further in other tariffs in order to discover via what routes the lower rate was in effect."[27]

b. Minimum Car Weights

The minimum car weight is a component part of the lowest rate shown in the Institute books. Shipments of less than the minimum must go at a higher rate per barrel or an amount equal to the rate on the minimum must be

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[25] Manley, General Manager, Hawkeye (R) Tr. 41824-25.

[26] Simpson, Rate Clerk, I.C.C. (C) Tr. 9509-10.

[27] (C) Tr. 9610.

paid.[1] There are instances in the classification where minimums specified are as low as 10,000 pounds or as high as 100,000 pounds. Institute books would have to be disregarded if there was any doubt concerning the minimum applicable and the railroad would have to be consulted.[2]

Cement traffic managers testified that there is no difficulty in using Institute books however because minimum weights prevail over wide areas and are rarely changed. The entire territory east of the Mississippi River has the same minimum car load weight. Effective December 2, 1896 it was 28,000 pounds; effective February 1, 1899, 30,000 pounds; effective February, 1900, 38,000 pounds subject to marked capacity of car but in no case less than 30,000 pounds; effective January 11, 1907 it was 50,000 pounds subject to marked capacity of car but in no case less than 40,000 pounds; and since January 5, 1924 the minimum has been 50,000 pounds unless marked capacity of car was less.[3] A person experienced in shipping a commodity has knowledge of minimum car load regulations with respect to that commodity and it would be superfluous to put this data in a rate book. A shipping clerk for a company shipping over only a few lines running from a plant would learn minimum car load requirements in a short time.[4] Cole, Traffic Manager of Medusa, stated that the railroads

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[1] Simpson, Rate Clerk, I.C.C. (C) Tr. 9403-04, 9461-62.
Glessner, Chief of Frt. Rate Branch, I.C.C. (C) Tr. 9560-62.
Hayghe, Chief of Traffic Section, Proc. Div., Treas. Dept. (C) Tr. 9606.
Jones, Asst. to Chief of Traffic Section, Proc. Div., U. S. Treas. Dept. (C) Tr. 9624-25, 9636-37.
Billingsley, Asst. to Chief of Traffic, Proc. Div., Treas. Dept. (C) Tr. 9667.

[2] Simpson, *supra*, Tr. 9459-60, 9488-89.

[3] Cole, Traffic Manager, Medusa (R) Tr. 41116-19.

[4] Jones, *supra*, Tr. 9632-36.

furnished his company with equipment that held 50,000 pounds or more and that the size of the car furnished by the railroads does not in practice effect rate information appearing on the Institute books.[5] Several companies state that they seldom, if ever, ship less than a minimum tariff car load of 132 barrels, approximately 50,000 pounds[6] and that in their territories rates on cement differ with the size of the car only where the shipment is below the minimum weight so that on larger shipments rates shown on the Institute's books are applicable.[7] The traffic manager of Volunteer stated that if there are different rates for different car sizes his company is not effected.[8]

Some Institute rate books do show minimum car weights. Others do not. In some cases correction sheets show applicable minimum car weights.[9] R. W. Moore, then Traffic Manager of Dewey, operating in that territory testified that the books compiled by his company do not contain this information and he did not have to go to tariffs for this information because he knows the territory where the higher minimum applied.[10] The Texas and New Mexico books show

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[5] (R) Tr 40753-54.

[6] Robeson, Vice President, Nazareth (R) Tr. 28431-36.
Warren, G. E., Vice President, Southwestern (R) Tr. 29360-61.
McKee, Vice President, West Penn (R) Tr. 27889-90.

[7] McGovern, Sales Manager, Hermitage (R) Tr. 36168-69.
Warren, G. E., *supra*, Tr. 29360-64.

[8] Roberts, Traffic Manager, Volunteer (R) Tr. 31756-57.

[9] Com. Ex. 3016 2 I-2R: Cor. #35 to Kansas #2.
Com. Ex. 3016 2 Y: Cor. #42 to Kansas #2.

[10] Moore, R. W., Vice President, Dewey (R) Tr. 47186, 47190-91, 47178, 47188, 47193-95, 47444.

different rates applying on different weight cars,[11] and correction sheets to Florida rate book No. 3 and Virginia rate book No. 4 also refer to different rates applying according to car weights.[12]

c. Switching Charges

Switching charges are not shown in any Institute books. If a contractor is going to take delivery on the team track of a delivering line that did not receive the road haul, there is an addition to the road haul rate in the form of a switching charge of some kind. However, an ordinary shipment of freight taking delivery on a line other than the originating line, the charges are always absorbed out of the line haul.[1] Switching charges if any at some buyer's private siding are universally absorbed by the last carrier receiving a line haul.[2] The traffic manager of a southeastern company states that his company has never been presented with a bill for switching services, that most of his shipments go to private or assigned sidings, and that his company merely uses the rate shown to the particular town as the basis of charges since there are no rates to sidings, but only to towns.[3]

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[11] Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 38906-07.
Com. Exs. 1110 BB: Texas #2; 1110 T: New Mexico #1.
Com. Ex. 3037: Correction Sheets to Texas #2.
Com. Ex. 3247: Texas #3.

[12] Com Ex. 3038: Virginia Correction Sheets to Rate Book #4.
Com. Ex. 3011: Correction Sheets to Florida #3.

[1] Cole, Traffic Manager, Medusa (R) Tr. 40768-69.

[2] Roberts, Traffic Manager, Volunteer (R) Tr. 31763-64.

[3] Id., Tr. 31764, 31768-69.

From the point of view of service to the customer, companies like to know the line on which the customer is located and to direct traffic to arrive without unreasonable delay. Since there is no official publication that lists team tracks or users thereof, they try to find out through their salesmen or from the customer the particular delivery the customer desires. If they cannot find this out, they merely turn the shipment over to some carrier and direct it to the town. The shipment is then placed on the team track of the delivering carrier nearest the customer's place of business. No charge over and above the rate to the town is involved so far as either shipper or consignee is concerned.[4]

In the course of correspondence between Reigart, Manager of the Bethlehem Bureau, and Roberts, Traffic Manager of Volunteer, concerning freight charges between Knoxville, Tenn. and River Front and South Knoxville Extensions, Reigart wrote on November 7, 1934:

[Italicized part quoted in Fdgs. Par. Eight (d)]

["*As you probably understand, rate books show lowest rate available to any given destination, and are not intended for shipping purposes. And, under these circumstances, we do not carry destinations which are located within switching districts of stations to which rates are published or, as in the instant case, where it is possible to accomplish delivery at the Knoxville rates.*"][5]

As to this letter Neylan, Asst. General Sales Manager of Lone Star, testified:

"Q. I am calling to your attention Exhibit 210-B [sic. 1002 B], a letter written by Mr. Reigart, manager of the Bethlehem Freight Bureau of the In-

[4] Roberts, Traffic Manager, Volunteer (R) Tr. 31763-64, 31766-68.

[5] Com. Ex. 1002 B.
Resp. Ex. 2243 A.

stitute, to C. M. Roberts, traffic manager of the Volunteer Company at Knoxville, November 7th, 1936, about the time of this Virginia transaction, and in the course of that letter, Mr. Reigart makes the statement that the rate books show the lowest rate available to any given destination and are not intended for shipping purposes. Do you contend, nevertheless, that they are intended for shipping purposes? A. I cannot help what Mr. Reigart says. We use them for shipping purposes.'"[6]

Roberts, Traffic Manager of Volunteer, testified to the use of the books for shipping purposes by his company to destinations at which the Company had no price card on file:

"A. I use them both in figuring prices and for calculating the freight from our mill to destination.

* * *

A. Of course, that rate is given to our shipping department, who puts it on our bill-of-lading.'"[7]

Elcock, Vice President of Southern States, when asked if they were adequate for shipping purposes replied: "The handiest thing we have; use it all the time."[8]

H. Value of the Books to the Users.

Executives of companies subscribing to the Institute service testified that they use the books because it gives

[6] (C) Tr. 6224-25.

[7] (R) Tr. 31745-46.

[8] (R) Tr. 32606.

them in convenient,[1] accurate,[2] quickly available and easily useable[3] form at small expense[4] or at cost considerably

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[1] Alpha: Coogan, Vice President (R) Tr. 23274-76.
Edison: Sweeney, Vice President (R) Tr. 35803-04, 35807.
Federal: Bates, J. E., Sales Manager (R) Tr. 30760.
Hercules: Brobston, President (R) Tr. 26164.
Hermitage: McGovern, Sales Manager (R) Tr. 36168-69.
Keystone: Scott, H. M., President (R) Tr. 27473-74.
Kosmos: Horner, President (R) Tr. 36821-22.
Lone Star: Hogan, President (R) Tr. 34678.
Medusa: Cole, Traffic Manager (R) Tr. 41383.
Monarch: Brooke, Vice President (R) Tr. 42196-97.
Nazareth: Robeson, Vice President (R) Tr. 28399-400.
Southern States: Elcock, Vice President (R) Tr. 37638-39.
Volunteer: Parsons, Sales Manager (C) Tr. 5025.
West Penn: McKee, Vice President (R) Tr. 27751.
Whitehall: Elliott, Vice President (R) Tr. 28526.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35921.

[2] Alpha: Coogan, *supra*, Tr. 23274-76, 24612.
Hercules: Brobston, *supra*, Tr. 26164, 26173-74.
Keystone: Scott, H. M., *supra*, Tr. 27473-74.
Lehigh: Bowen, Vice President (R) Tr. 27001.
Lone Star: Hogan, *supra*, Tr. 34677-78.
Monarch: Brooke, *supra*, Tr. 42196-97.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38184.
Southwestern: Jennings, W. J., former Manager (Osborn) (C) Tr. 11169-70.
Whitehall: Elliott, *supra*, Tr. 28526.
Universal Atlas: Reiter, Vice President (C) Tr. 16874.

[3] Green Bag, W. Va.: Wood, General Manager (R) Tr. 29866-67, 29878-79.
Keystone: Scott, H. M., *supra*, Tr. 27639-41.
Lawrence: Ackerman, Sales Manager (C) Tr. 8236.
Lehigh: Bowen, *supra*, Tr. 26998.
Medusa: Cole, *supra*, Tr. 40744.
Southwestern: Warren, G. E., Vice President (R) Tr. 29163.
Volunteer: Roberts, Traffic Manager (R) Tr. 31855-64, 31931.
Whitehall: Elliott, *supra*, Tr. 28526.

[4] Aetna: Calvin, President (R) Tr. 30356-57.
Bessemer: Warren, F. B., Vice President (R) Tr. 32224.
Keystone: Scott, H. M., *supra*, Tr. 27473-74.
Kosmos: Horner, *supra*, Tr. 36821-22.

less than the cost of compiling and maintaining similar books individually[6] rate information which they must have

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Lawrence: Ackerman, Vice President (R) Tr. 31273.
Lone Star: Hogan, President (R) Tr. 34677-78.
Medusa: Dawson, Vice President (R) Tr. 40101.
Cole, Traffic Manager (R) Tr. 40745.
Monarch: Brooke, Vice President (R) Tr. 42196-97.
Nazareth: Robeson, Vice President (R) Tr. 28431.
Volunteer: Parsons, Sales Manager (C) Tr. 5025.
Roberts, Traffic Manager (R) Tr. 31774-75.
West Penn: McKee, Vice President (R) Tr. 27887-88.
Whitehall: Elliott, Vice President (R) Tr. 28684-87.

[6] Alpha: Coogan, Vice President (R) Tr. 23274-76, 24612.
Bessemer: Warren, F. B., Vice President (R) Tr. 32362-68.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39829-31.
Edison: Sweeney, Vice President (R) Tr. 35845-51.
Hercules: Brobston, President (R) Tr. 26173-74.
Keystone: Scott, H. M., President (R) Tr. 27477, 27482-83.
Kosmos: Horner, President (R) Tr. 36982-83.
Lawrence: Ackerman, Sales Manager and Vice President (C) Tr. 8222, (R) 31327.
Lone Star: Koch, Vice President (R) Tr. 33119, 33123-34, 33165-68.
Hogan, *supra*, Tr. 34677-78.
Medusa: Cole, *supra*, Tr. 40715-16, 40722-23, 40744-45.
Monarch: Brooke, *supra*, Tr. 42196-97.
National: Dannelly, Vice President (R) Tr. 39588-90.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38210.
Petoskey: Lucas, Vice President (R) Tr. 38708-09.
Southern States: Elcock, Vice President (R). Tr. 37525-26, 37638-39.
Southwestern: Warren, G. E., Vice President (R) Tr. 29163.
Universal Atlas: Reiter, Vice President (C) Tr. 12127-32.
Stone, Vice President (R) Tr. 35124-25.
Volunteer: Parsons, *supra*, Tr. 5135-36, 5229, 5241.
Roberts, *supra*, Tr. 31774-75.
Hanahan, President (R) Tr. 38660-62.
West Penn: McKee, *supra*, Tr. 27751-52.
Whitehall: Elliott, *supra*, Tr. 28684-87.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35921, 36029-30.

in the operation of their business,[6] and which in the absence of rate compilations would bring about great difficulty and considerable waste of time in handling tariffs,[7] and in compiling lists.[8]

For example, Coogan, Vice President of Alpha, a chain company, testifying as to the advantage and economy in

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[6] Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39861.
Hermitage: McGovern, Sales Manager (R) Tr. 36168-69.
Keystone: Scott, H. M., President (R) Tr. 27482.
Kosmos: Horner, President (R) Tr. 37038.
Lone Star: Hogan, President (R) Tr. 34677.
Monarch: Brooke, Vice President (R) Tr. 42384.
National: Dannelly, Vice President (R) Tr. 39591.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38189, 38210.
Petoskey: Lucas, Vice President (R) Tr. 38708-09.
Southern States: Elcock, Vice President (R) Tr. 37525-26.
Volunteer: Parsons, Sales Manager (C) Tr. 5135-36, 5241.
Roberts, Traffic Manager (R) Tr. 31855-64.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36029-30.

[7] Dewey: Moore, R. W., Vice President (R) Tr. 46686-90.
Hercules: Brobston, President (R) Tr. 26169.
Hermitage: McGovern, *supra*, Tr. 36409-11.
Keystone: Scott, H. M., *supra*, Tr. 27639-41.
Louisville: Hill, Vice President (C) Tr. 13287.
Nazareth: Robeson, Vice President (R) Tr. 28399-400.
Penn-Dixie: Browder, *supra*, Tr. 38188-89.
Southern States: Elcock, *supra*, Tr. 37525-26, 37613.
Volunteer: Roberts, *supra*, Tr. 31762, 31855-64.
Whitehall: Elliott, Vice President (R) Tr. 28692-93.

[8] Alpha: Coogan, Vice President (R) Tr. 24612, 24805.
Oklahoma and Arkansas: Thompson, Sales Manager (R) Tr. 46511-13.
Bessemer: Warren, F. B., Vice President (R) Tr. 32361-68, 32613-15.
Hermitage: McGovern, *supra*, Tr. 36168-69, 36156-57.
Lone Star: Hogan, *supra*, Tr. 34675-77.
Penn-Dixie: Browder, *supra*, Tr. 38189-91.
Volunteer: Roberts, *supra*, Tr. 31976-78, 31981.

the use of Institute books in preference to books formerly compiled by his company said:

> "Q. Well then, what is the advantage, Mr. Coogan, to your company of subscribing to the Institute rate service, instead of publishing your own book? A. Because it is issued in an entirely convenient form. It has the advantage of being checked by several different companies who maintain their own traffic department, and I think it insures correctness."[9]

And further:

> "Q. Would it be any difference in expense between the two methods, Mr. Coogan? A. Yes. If the company were starting up, we will say, a one plant company, and they had to compile and keep up the data to date of their own freight rates, there would be a considerable difference in the expense. In the case of a chain company, but companies do not usually start as chain companies; they usually start smaller and grow, after they become a chain company you probably will maintain a traffic department whether you have the Institute freight rate books or not.
>
> Now, it is true with the Institute books your traffic department will perhaps be somewhat smaller than if you had no Institute books, because it certainly is a little simpler to check freight rates that are in the Institute books than it is to issue them, and there is some saving to the chain mills and a fairly good saving to the smaller mills."[10]

Emphasizing that the value is merely in economy and not in any information peculiar to the freight rate books, Coogan testified:

> "Q. During the period you were not getting Institute freight rate service, did you notice any differ-

[9] (R) Tr. 23274.

[10] (R) Tr. 23275.

ences in your ability to meet competition at given destinations? A. Why, no, we had our own freight rates, information, and they were correct, and whenever we found—whatever price we found at any destination that's the price we met.

Q. I take it, then, the absence of that freight rate service from the Institute would mean nothing to you if it was completely and finally discontinued? A. No.

Q. It does not give you any service that you would not otherwise get; is that right? A. I explained to you yesterday that there was the matter of a slight saving and convenience, but so far as the actual facts, and freight rates are concerned, we can work them up just as well as the Institute, or anybody else."[11]

Cole, Traffic Manager of Medusa, testifying on the economy in the use of the Institute books, said:

"A. My study reflects that there is a very substantial saving to the company through the use of The Cement Institute's freight rate books.

By Mr. Withrow:

Q. You say a substantial saving. What did you calculate it would be, including wages, additional help, printing cost, and things like that? A. Between eight and ten thousand dollars.

• • •

A. A year."[12]

Pearson, Secretary and Treasurer of Cumberland, a single mill company, testifying as to the economy in use of Institute books said:

"After the freight rate books were available to us, we abandoned all our traffic department. The only thing we use now, and since those books have been

[11] (R) Tr. 24804-05.

[12] (R) Tr. 40745.

available, is what might be called a shipping clerk, who handles all freight rate information, the invoices and the billing. We do not try to maintain any railroad tariffs any longer.

Q. Can you tell me what your estimate has been as to the amount of saving to the company by reason of having the Institute rate books?

Mr. Wooden: Objected to, your Honor. It constitutes merely a guess or a conclusion of the witness.

Mr. Werle: If it is a guess, I do not want it, either.

Trial Examiner Norwood: You may cross-examine him on it. The objection is overruled.

By Mr. Werle:

Q. You may answer, Mr. Pearson. A. Yes; I have made an estimate some time ago.

Q. Will you tell me what that estimate was, and how you determined it? A. Well, I took the cost of the traffic department that we at one time had, which included the traffic manager and an assistant and a lady stenographer, all of whom were replaced by this one bill clerk in our plant office. The amount of the saving I have estimated to be between $3,600 and $3,800.

Q. Is that per year? A. Per year."[13]

Koch, Vice President of Lone Star in charge of traffic, speaking of the dollar economy in the use of Institute books, testified:

"Q. You say all the difference between your $53,000 traffic expense in 1929, and your $16,000 traffic expense in 1939, is due to the fact that you subscribe to the Institute freight book service? A. I would attribute practically all of it to that, because I can replace a high cost traffic man with a cheaper one."[14]

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[13] (R) Tr. 39830-31.

[14] (R) Tr. 33167-68.

Roberts, Traffic Manager of Volunteer, identified 17 different railway tariffs[15] and testified that it would be necessary to use all of them to check the freight rates from headline points shown in the Institute's freight rate book to the destination points shown in Virginia.[16]

Browder, Traffic Manager of Penn-Dixie, examined as to the possibility of getting out a general list of prices at a time of price change without the use of a rate book, testified:

> "Q. Have you ever attempted to get out quotations at the time of a price change, whether made by your company or a price change of a competitor, which your company was meeting without using some form of freight rate book? A. No.
>
> Q. Would it be possible for you to do it in your sales organization?
>
> Mr. MacIntyre: I object.
>
> Q. Without——
>
> Mr. MacIntyre: It calls for speculation.
>
> Trial Examiner Norwood: Well, I think he may answer from the standpoint of whether or not there are any other sources of information that would be sufficient for that.
>
> Mr. Brick: All right.
>
> Well, will you consider that in the form of a question and answer it, Mr. Browder?
>
> The Witness: The sales department could call on the traffic department to work up the rates that they desire, but it would take days or weeks or a month, depending upon the territory involved for the traffic department to work them up from the tariffs. It could be done, but not on a days' notice, as we do it at the present time."[17]

F. B. Warren, the Vice President of Bessemer in charge of sales, testifying as to the value of the Institute books

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[15] Resp. Exs. 2257-2273.

[16] (R) Tr. 31854-55.

[17] (R) Tr. 38188-89.

over company compiled books to his single mill company, said:

> "Q. And what were your reasons for discontinuing the publication of your own rate book? A. The difficulty and great amount of time involved in making these books.
>
> Q. Do you know how the cost of preparing your own rate books compared with the cost in purchasing rate books from The Cement Institute?
>
> Mr. MacIntyre: I object. It is irrelevant and immaterial.
>
> We, of course, have admitted heretofore, and we do now admit that it is more economical for the respondents to get from The Cement Institute what they do get from The Cement Institute in the form that they get it than they could make it up themselves in such form.
>
> Trial Examiner Norwood: No, but that is not just exactly the question.
>
> Mr. McIntyre: It goes to the precise question that is asked this man, as to whether or not to make it up himself would be more expensive than to buy it from The Cement Institute. We agree that it would be less expensive.
>
> Mr. Wooden: We agree that The Cement Institute rate book is just as much a convenience for the purpose as the burglar's jimmy is for his convenience.
>
> • • • •
>
> A. Mr. Withrow, I do not recall either of those costs, but I recall studying the question carefully and finding that it would be a saving in time; it would save us a lot of time that we could use; it would be a very economical thing for us to discontinue these rate books of our own and using the ones that come from the Institute."[18]

Similar testimony as to the economy and other advantages of the Institute books was given by the following executives of the companies named:

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[18] (R) Tr. 32362-64.

Edison: Sweeney, Vice President (R) Tr. 35803.

Hercules: Brobston, President (R) Tr. 26164, 26173-74.

Hermitage: McGovern, Sales Manager (R) Tr. 36168-69.

Keystone: Scott, H. M., President (R) Tr. 27482-83.

Lawrence: Ackerman, Sales Manager (C) Tr. 8222.

Lone Star: Koch, Vice President (R) Tr. 33166-68, 33131-33, 33119.

Southern States: Elcock, Vice President (R) Tr. 37525-26.

Wolverine: Nelson, J. L., Vice President (R) Tr. 36029-30.

The rate expert, Simpson, testified that:

> "All tariffs require someone experienced with traffic matters to interpret them. They are all, almost all of them, complicated."[19]

And as to the number of different tariffs, rates, rules and regulations applying under any circumstances to the shipment of Portland cement he testified:

> "Q. Well it runs into many, many thousands, does it not?——. A. Many millions.
> Q. —as a matter of fact—— A. And beyond that."[20]

I. Absence of Agreement as to the Manner of Using Freight Rate Books.

Witnesses for twenty-three respondents denied that their companies have or ever had any agreement with competi-

[19] (C) Tr. 19262.

[20] (C) Tr. 19325.

tors upon any aspect of the use or non-use of the Institute Rate Books.[1]

Seven more respondents denied specifically any agreements or understandings to use rates shown in Institute books whether or not such rates are correct.[2] Lone Star further denied any agreement to report correct rates differing from book rates to the Institute before using them.[3]

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[1] Alpha: Coogan, Vice President (R) Tr. 23276-77, 24631.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39860-61.
Dewey: Moore, R. W., Vice President (R) Tr. 46703.
Edison: Sweeney, Vice President (R) Tr. 35804.
Federal: Bates, J. E., Sales Manager (R) Tr. 30760-61.
Glens Falls: Titsworth, President (R) Tr. 47912-13.
Hercules: Brobston, President (R) Tr. 26173.
Hermitage: McGovern, Sales Manager (R) Tr. 36166.
Keystone: Scott, H. M., President (R) Tr. 27481-82.
Kosmos: Horner, President (R) Tr. 36982.
Lawrence: Ackerman, Vice President (R) Tr. 31274.
Lone Star: Hogan, President (R) Tr. 34679.
Medusa: Cole, Traffic Manager (R) Tr. 40796-97.
Missouri: Alexander, President (R) Tr. 37315-16.
National: Dahnelly, Vice President (R) Tr. 39591.
Nazareth: Robeson, Vice President (R) Tr. 28357.
Northwestern Portland: Hollister, President (R) Tr. 48119.
Petoskey: Lucas, Vice President (R) Tr. 38709.
Pittsburgh Plate Glass: Letzkus, Sales Manager (R) Tr. 37755-58.
Southern States: Elcock, Vice President (R) Tr. 37526.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 39249.
Whitehall: Elliott, Vice President (R) Tr. 28528.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36027.

[2] Federal: Bates, J. E., *supra*, Tr. 30760-61.
Kosmos: Horner, *supra*, Tr. 36982.
Medusa: Cole, *supra*, Tr. 40796-97.
Petoskey: Lucas, *supra*, Tr. 38709.
Pittsburgh: Letzkus, *supra*, Tr. 37755-56.
Volunteer: Parsons, Sales Manager (C) Tr. 5231.
Wolverine: Nelson, J. L., *supra*, Tr. 36026-27.

[3] Neylan, Assistant General Sales Manager, Lone Star (C) Tr. 6202.

Seven denied that they did not use correct rates if they differed from Institute book rates until the corrections appeared in the Institute books.[4] Four denied use of book rates in the calculation of prices rather than rates determined by company traffic departments.[5] Four denied that the Institute has ever issued instructions for the use of the books for any purpose.[6]

Many witnesses were examined to disclose, if possible, the existence of an agreement to adhere to the rates shown in the Institute book whether they were correct or not as of the time of use in order that there would be no variance in destination prices quoted. All the witnesses examined on this subject denied any such agreement. Upon this point Coogan, Vice President of Alpha, testified:

> "Q. You say that under the freight rate service furnished by The Cement Institute there has been no understanding that the members would use the rates shown in the freight rate books or correction sheets regardless of whether they represented the actual existing current freight rate or not? A. Our company has no such understanding.
>
> Q. Can you cite any instances where your company has put a reduced freight rate into effect with-

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[4] Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39860-61.
Dewey: Moore, R. W., Vice President (R) Tr. 46703.
Hermitage: McGovern, Sales Manager (R) Tr. 36166.
Kosmos: Horner, President (R) Tr. 36986.
Lone Star: Neylan, Assistant General Sales Manager (C) Tr. 6200.
Medusa: Cole, Traffic Manager (R) Tr. 40758-59, 40796-97.
Volunteer: Roberts, Traffic Manager (R) Tr. 31924.

[5] Dewey: Moore, R. W., *supra*, Tr. 46703.
Hawkeye: Manley, General Manager (R) Tr. 41917, 41836.
Missouri: Alexander, President (R) Tr. 37315.
Southern States: Elcock, Vice President (R) Tr. 37606.

[6] Hawkeye: Manley, *supra*, Tr. 41836.
Lone Star: Hogan, President (R) Tr. 34678-79.
Monarch: Brooke, Vice President (R) Tr. 42293.
Missouri: Alexander, *supra*, Tr. 37315.

out first notifying the Institute? A. If we find anything wrong with the Institute rate books, we use the correct rate and then we do notify them if we find anything wrong in it immediately.

Q. And in case of a reduction doesn't that put you in at a given destination at a lower delivered price than those that don't have that information? A. Well, everybody gets information about reduced price—reduced freight rates. That is not peculiar to the Alpha Company. We are not the only ones that get it.

Q. But you get the information for some destinations that other companies are not interested in, don't you? A. Well, if they are not interested in it, why, then, they wouldn't be interested in what prices we quoted there, either.

Q. I mean, they are not directly, substantially interested? A. I have told you that our instructions are that under no circumstances must we ever use any rate that we know is incorrect; that we should use the correct rate and then notify the Institute.

Trial Examiner Norwood: Regardless whether it is in the books or not?

The Witness: Yes, sir.'"[7]

Denying any agreement not to use a rate until it had first been reported to the Institute, Roberts, Traffic Manager of Volunteer, testified:

"Q. Isn't it understood by you that you should not use a new rate, a new freight rate, for making prices until The Cement Institute has issued the announcement about it? A. We have no such understanding.

Q. Not with your competitors, but don't you have that understanding—— A. No.

Q. —Mr. Roberts? A. No.

Q. Well, as a matter of fact, however, so far as you know, that is the case, is it not? A. Not with our company; we use whatever rates we find.

[7] (R) Tr. 24631-32.

Q. Yes, but I say, so far as you know, the changes by competitors due to freight rate changes do not occur until after announcement by the Institute,—so far as you know? A. The advance information is given to the public if a change in freight rate occurs; naturally, The Cement Institute has it.

Q. Well, that does not quite answer the question. To your knowledge, does your competition change its prices when there is a freight rate modification prior to an announcement from The Cement Institute? A. They do not always change their prices.

Q. That still does not answer the question, but I think we have been over that, your Honor, and I will leave it."[8]

Several witnesses testified that they did not know whether their competitors used the Institute books and that they would use them whether their competitors did or not.

On this point Ackerman, Vice President of Lawrence, testified:

"Q. Do you subscribe to them without knowing whether or not your competitors subscribe to them? A. You bet your life.

Q. Would you continue to use them if you knew your competitors were not using them? A. If I can continue to get freight rate books from the Institute for less money than what I could prepare my own freight rate books, I would continue to use freight rate books from the Institute irregardless of whether my competitors get a freight rate book or not.

Q. That is not quite a responsive answer, but I said—if you knew your competitors were not using freight rate books, would you use them—the Institute freight rate books—would you use them? A. The fact that a competitor does or does not use a freight rate book has no bearing on whether I will use it or not."[9]

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[8] (R) Tr. 31924-25.

[9] (R) Tr. 31327

Roberts, Traffic Manager of Volunteer, put it this way:

> "Q. Mr. Roberts, do you know whether or not your competitors determine their prices on some base plus the Institute rate book rate? A. I do not know what they use, Mr. Werle. I merely assume the fact that they use The Cement Institute book. They might use the tariff or the Institute book, or some other information."[10]

Letzkus, Vice President of Pittsburgh Plate Glass, said:

> "A. I never—I never saw an Institute book in the hands of any of our competitors, and I do not believe that any competitor ever told me that he was using it. Now, I, as a matter of fact, I had no idea that so many competitors did use it until I would read some of the testimony that has been given by different companies here at these various hearings.
>
> Q. Do you have an opinion, or knowledge as to how they did figure their freight rates? A. Well, I would assume if they were not using those Institute books, they would have to get it from the railroads, from the tariffs. That is the only source I know of from which you can get it."[11]

Representatives of many respondents testified that destination prices figured by manufacturers would not be different if they used rates taken directly from the official tariffs instead of taking them from the Institute books.[12]

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[10] (R) Tr. 32014.

[11] (R) Tr. 37977-78.

[12] Robeson, Vice President, Nazareth (R) Tr. 28396-97.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6194-95.
Hogan, President, Lone Star (R) Tr. 34678.
Coogan, Vice President, Alpha (R) Tr. 23273.
Brobston, President, Hercules (R) Tr. 26169.
Scott, H. M., President, Keystone (R) Tr. 27482.
McKee, Vice President, West Penn (R) Tr. 27751.
Elliott, Vice President, Whitehall (R) Tr. 28526.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 29878-80.
Bates, J. E., Sales Manager, Federal (R) Tr. 30764.
Roberts, Traffic Manager, Volunteer (R) Tr. 31943-44.

A representative of Volunteer thought that using rates taken from the tariffs rather than the rate books would increase the percentage of variation at destination.[13]

A number of companies received tariffs and all tariff changes direct from the railroads.[14] Cole, Traffic Manager of Medusa, testified that he recalls no instance where any rate had become effective from one of his companies mills before he had notice of it, even where a change had been permitted upon one day's notice. A notice from the Institute is not generally the first notice of rate changes.[15] Several representatives testified to knowledge of freight rate changes in advance from other sources than Institute notices.[16]

Representatives of four companies testified that they do not exchange freight rate information with their competitors or notify their competitors of any rate differences discovered.[17] The companies are interested in getting the correct rate which is the only rate upon which they can depend for any of the several purposes for which they use the rates.

Neylan, Assistant General Sales Manager of Lone Star, testified that his only interest was in the correct rate and

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[13] Parsons, Sales Manager, Volunteer (C) Tr. 5241-43.

[14] Roberts, Traffic Manager, Volunteer (R) Tr. 31921-23.
Warren, G. E., Vice President, Southwestern (R) Tr. 29336.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36601.
Cole, Traffic Manager, Medusa (R) Tr. 40757-58.

[15] Cole, *supra*, Tr. 40767.

[16] MacDonald, *supra*, Tr. 36601.
Roberts, *supra*, Tr. 31921-23.
Horner, President, Kosmos (R) Tr. 36986.
Resp. Ex. 2891 A-L: Office Memoranda of Pittsburgh Plate Glass.

[17] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6214.
Coogan, Vice President, Alpha (R) Tr. 24616-17.
MacDonald, *supra*, Tr. 36701-02.
Alexander, President, Missouri (R) Tr. 37314.

that he did not expect a competitor not to use a correct rate just because he did not find it, or it was not yet entered, in the Institute books.[18]

Coogan, Vice President of Alpha, emphasized the folly from the seller's standpoint of using inaccurate freight rates, saying:

> "A. The use of inaccurate freight rates would cause chaos between ourselves and our customers, because if we used a low rate, we would probably have the effect of depressing the market in that town, and if we used a higher rate, I suppose we would not get any business."[19]

Representatives of twenty-one other companies emphasized that they would use any correct rate immediately they discovered it without a reference to its publication in the Institute books.[20]

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[18] (C) Tr. 6218-21.

[19] (R) Tr. 23267.

[20] Aetna: Calvin, President (R) Tr. 30351-52.
Ash Grove: Sunderland, President (C) Tr. 13712-13.
Bessemer: Dankel, Sales Manager (C) Tr. 11351-52.
Colorado: Warner, Sales Manager (C) Tr. 12901.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39860-61.
Dewey: Moore, R. W., Vice President (R) Tr. 46700-01, 47260-61.
Federal: Bates, J. E., Sales Manager (R) Tr. 30760-61.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29869-70.
Hawkeye: Manley, General Manager (R) Tr. 41915-16.
Hermitage: McGovern, Sales Manager (R) Tr. 36163-64.
Huron: Meyers, Traffic Manager (R) Tr. 33305-07.
Kosmos: Horner, President (R) Tr. 36982.
Lehigh: Bowen, Vice President (R) Tr. 26999-7000.
Lone Star: Koch, Vice President (R) Tr. 33172-73.
Hogan, President (R) Tr. 34679.
Medusa: Cole, Traffic Manager (R) Tr. 40758-61.
Missouri: Alexander, President (R) Tr. 37315-16, 37331-32.
Monarch: Brooke, Vice President (R) Tr. 42293.

Sunderland testified that the use of a correct rate might make his price at destination different from others' prices, but that he would not let that concern him.

> "A. Well, if they (The Institute Rate Bureau) couldn't show authority we still used our own freight rate as interpreted and found in the railroad freight tariffs and our own traffic department.
>
> Q. Would that sometimes put you into certain destinations at lower delivered prices than if figured according to the Institute? A. It may have done so.
>
> Q. Do you know whether it did? A. Well, I can't answer that. It would be strange if, over all the years, with such a complicated mess as freight tariffs, that that wouldn't occur.
>
> Q. Wouldn't that put you in the position where you might be charged with chiseling if your delivered prices were under that of others figured according to other freight rates? A. Well, when I mentioned the other day about being charged with chiseling I had in mind being charged by the trade with not being consistent, with making flesh with one and fish with another.
>
> Q. You mean that such cases that you just referred to where delivered prices turned out differently because of different freight applications, that such would not be regarded as chiseling? A. Well, I wouldn't regard it as chiseling. An error isn't a reprehensible thing with human beings who are as apt to err as those in our company, and myself included.
>
> Q. Do you know whether that is the way such things are regarded in the trade? A. Well, I can't answer that. I would think so. That is the way I would regard it."[21]

Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36569-70.

Penn-Dixie: Browder, Traffic Manager (R) Tr. 38215.

Southwestern: Warren, G. E., Vice President (R) Tr. 29164-65.
Blair, W. R., Sales Manager (R) Tr. 38952.

Volunteer: Parsons, Sales Manager (C) Tr. 5025-31.

[21] (C) Tr. 13713-14.

Calvin, President of Aetna, testifying as to the care with which Aetna sought and used only the correct rate, said:

> "A. I have got some clerks in the shipping department, and I provided them with those master sheets, and there is a place on that sheet showing freight rates in barrels. I have tried to give those clerks the advantage of all the information that I could get, or tell them how to get, from any source, whether it is the freight rate books or tariffs, and to make those figures on that master sheet correct. Now, then, I cannot personally take the time to check and double-check. They have been told to check this information from every source. Now, at the present time we consider the most convenient and the easiest tariff that we have, or set of rates to handle, are those provided or published or compiled, or whatever you want to call it, by The Cement Institute, and they use those, but they have been cautioned and instructed to check rates where there is any doubt, and to see that they keep our books which we use from day to day correct.
>
> Q. According to the railroad tariffs? A. Correct. Oh, sure, the railroad tariffs."[22]

Reiter, Vice President of Universal Atlas, who had long experience as General Manager of the Institute, stated:

> "Q. Now, in all of your experience, Mr. Reiter, can you tell us of any instance where an incorrect rate was knowingly used by any cement company? A. I know of no such instance where an incorrect rate was used knowingly."[23]

The witnesses of several companies testified that if they found an error in the Institute books they would use the lower of the two rates in calculating their prices in

[22] (R) Tr. 30351.

[23] (C) Tr. 16870.

order to protect themselves against the price of a competitor who had or might use the lower of the two figures.[24]

McGovern, Sales Manager of Hermitage, testified that his company had been instrumental in securing a lower rate applicable in a particular section of his territory and that he had used it without notifying any one with the express purpose of being the low bidder.[25] Others testified that the use of the correct rate had resulted in making the low price upon at least one occasion for each company.[26]

Hogan, President of Lone Star, in his stipulation summarized the gist of the matter in the use of freight rate books prepared by the Institute rather than company compilation of freight rates, books from other sources or tariffs:

> "I was familiar with the reasons which prompted the Institute to undertake the issuance of rate books and the establishment of a freight rate service. The purpose was to provide an economical source of accurate freight rate information in convenient form. There was no other purpose.
>
> There was no idea in my mind, or to my knowledge, in the minds of the other trustees of the Institute, when we authorized the issuance of the rate books, that these books would be used as 'instruments of price maintenance,' nor do I consider that they ever have been so used.
>
> So far as my company is concerned, it would make no difference in its prices if we engaged a full traffic department and compiled every rate from the official tariffs rather than using the Institute rate

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[24] Wing, Vice President, Penn-Dixie (C) Tr. 8153.
Hill, Vice President, Louisville Cement Co. (C) Tr. 13222-23.
Elcock, Vice President, Southern States (R) Tr. 37525, 37615-16.
Dannelly: Vice President, National (R) Tr. 39590-91.

[25] McGovern, Sales Manager, Hermitage (R) Tr. 36166-68.

[26] Dankel, Sales Manager, Bessemer (C) Tr. 11351-52.
Sunderland, President, Ash Grove (C) Tr. 13711-13.
Roberts, Traffic Manager, Volunteer (R) Tr. 31945-49.
Moore, H. H., Secretary-Treasurer, Superior (R) Tr. 47261.

books. But the use of the Institute rate service saves us a lot of money and gives us accurate rates in convenient form."[27]

J. Land Grant Rate Service.

Evidence upon the application of land grant freight rates in sales of cement to the Federal Government appears in Part III, p. 658 and Part IV, pp. 752-92, *supra*, and on sales for WPA projects in Part XIV, *infra*, p. 2417.

The minutes of the trustees, at their meeting on December 9, 1935, show:

> "After discussion it was moved that land grant rates be assembled and distributed by the Freight Rate Bureau in the Chicago office, the mechanism to be outlined by Counsel. Motion duly seconded and unanimously carried."[1]

On Decemer 12, 1935 Reiter, as General Manager, issued an executive letter on land grant rates to all members of the Institute. The letter stated the purpose of compiling such rates and suggested a procedure therefor. It indicated that land grant rates were obtained only through disclosures made by the Government or by the railroads or through experience. The letter read as follows:

[Italicized part quoted in Fdgs. Par. Eight (m)]

> ["*At its meeting on December 9 the Board of Trustees instructed the General Manager to collaborate with the Freight Rate Bureau at Chicago in compiling and publishing for the convenience of the Members information regarding current Land Grant Rates on cement from the several points of origin to various destinations.*
>
> *It is the intention of the Institute to publish a schedule of current Land Grant Rates just as it has long*

[27] (R) Tr. 34677-78.

[1] Com. Ex. 624 E.

been the practice to compile and publish the actual commercial rates. Where it is impossible to secure the exact Land Grant Rates, the best available information, together with the source thereof, will be published.

We are, therefore, addressing each member and requesting you to send to us all information which you have concerning current Land Grant Rates applicable from your mills and also such information as you have concerning Land Grant Rates applicable from other mills. In compiling this data it is necessary that we designate the source of the information regarding such Land Grant Rates. Will you, therefore, indicate in each case the source of your information regarding the respective Land Grant Rates?]

In compiling this information you may find it convenient to submit it to us in schedule form with the various stations or points of destination listed in a vertical column along the left hand side of the page and the different points of origin indicated along the top of the page. Whether on such a schedule or otherwise please indicate the current Land Grant Rate from each point of origin to each point of destination where you have such information. Furthermore, in a foot note or otherwise please indicate as to each Land Grant Rate (a) whether it is one that you know has been used by the U. S. Government, (b) whether you secured it from a railroad or (c) from some other source. From time to time as you secure further information please send it to us in the same manner.

When this information is received by The Cement Institute it will be compiled and distributed in the hope that it will be a convenience to the Members since Land Grant Rates have not heretofore been published.'"[1]

On April 11, 1935 Reiter discussed the availability of information concerning land grant rates in his answer to

[1] Com. Ex. 841 A.

an inquiry by Dr. Arthur R. Burns of Columbia University concerning the filing of government destination prices under the Code, as follows:

> "Your understanding of Destination Costs to the U. S. Government substantially conforms to our own. For a short time at our request and covering only a few instances, the United States War Department when calling for bids included in their proposal the exact land grant rates from various points of origin to destination where cement was required and stated in the proposal that these land grants would be used in canvassing bids. In all other cases exact land grant rates are known only to the Government, and in response to requests from this office the Government has refused to disclose such land grant rates.
>
> Therefore, of necessity when figuring a Destination Cost to the U. S. Government a Member of the Industry uses an estimated land grant rate as determined by his own Traffic Department in conjunction with railroads themselves. Such estimated land grant rates ordinarily vary from the actual only by a small fraction of a cent per hundred pound."[3]

The Code Authority at its meeting in San Francisco on May 14-15, 1934 discussed Land Grant Rates which were supplied by the Government to bidders and the Chairman said:

> "* * * in some proposals of the United States Government the correct land grant rates to be used for the purpose of canvassing bids were supplied to bidders by Government officers, such as those included in the proposal for the Bonneville, Oregon, letting of May 17."[4]

The Chairman of the Code Authority wrote to Partridge, General Sales Manager of Southwestern, on March 12, 1934, concerning the difficulty of computing land grant

[3] Com. Ex. 277 K.

[4] Com. Ex. 559 B.

rates and checking them with the figure used by the Government. The letter related to filing destination costs to the United States Government with the Code Authority, and it said:

> "We agree that it is difficult for any two experienced traffic men to arrive at the same computation of land grant rates and it is even more difficult to check with the figures used by the United States Government itself and such figures, of course, form the basis of an award. Some thought has been given to requiring the filing of land grant rates with The Cement Institute, but that has not yet been arranged and may not be practical."[5]

On July 18, 1935, Barton, the Traffic Manager of Ash Grove, wrote to Waterbury, Traffic Manager of Lehigh at Chicago, in connection with obtaining from the Milwaukee Railroad information on land grant rates for points in Nebraska as follows:

> "Our Company has been allocated the state of Nebraska for the quotation of rates based on land grant percentages from various producing points among which is Mason City, Iowa.
>
> I was wondering if you would take the attached list which does not bear our letterhead, and ask the Milwaukee Railroad to quote you the land grant rates for movement of cement from Mason City to each destination. This would certainly help a lot as I have the others to figure.
>
> I assume they would not give it to me as they might think that our plant not being at Mason City they would not care to go to the trouble, but they would for you. I certainly would appreciate it if you could get the information."[6]

On Oct. 8, 1934, the Institute published "Land Grant Rates for T.V.A. Projects". It stated that these rates had

[5] Com. Ex. 753 C.

[6] Com. Ex. 831 L.

been secured from the Federal Traffic Section, Washington, D. C.[1]

On December 16, 1935 the Traffic Manager of Ideal wrote in reply to the executive letter of December 12th describing certain land grant information which it had and questioning its value. The letter said:

> "I have in my possession War Department Land-Grant Percentages, Circular No. 5, dated October 1, 1929, containing 109 pages of land grant rates that must be used over single lines. Also Supplement 1 to this circular dated March 1, 1930, containing 43 pages of land grant percentages covering points on the Atchison, Topeka & Santa Fe Railway.
>
> I also have Schedule of Land-Grant and Bond-Aided Railroads of the United States, Circular No. 4, February 1, 1922, showing the exact mileages to be used on various lines that have land grant rates or Bond-Aided concessions. On page 3 of this Circular there are instructions as to how the Circular will be used by the Quartermaster General, and as these Circulars are private information of the Government and concern matters that the general public has nothing to do with, I am at a loss to understand how we are going to arrive at what the Government may use in connection with the divisions of the rates as between carriers.
>
> Practically all of the land grant rates we have figured are worthless today for the reason that they do not include the 1¢ emergency increase, under the Emergency Charge ruling of the Commission. And any rates we figure today which include this Emergency Charge will be worthless after June 30, 1936.
>
> Therefore, I am unable to see just what use could be made of existing figures as it will require some time, say until next June 30th to assemble these figures and get them in some kind of form, and at that time they will be worthless.
>
> I suggest that if something is to be done in the direction of carrying out the instructions contained

[1] Com. Ex. 883-2 K-2 N.

in your circular letter, that a Committee be formed to go into this matter thoroughly and arrive at concrete conclusions as to exactly what is to be used in the formation of these rates. Then figure the rates out by agreement of the best methods at hand.

This Committee should be in session at least for the next three months at some place where full rate information is available.

After all of these rates are figured and published, may I ask what possible use they can be as no one knows what the Traffic Manager of the Bureau in Washington may do in connection with figuring a rate on a given origin or destination. And if his figures are different from yours it seems to me that all of our land grant efforts are worthless."[8]

Following Reiter's executive letter of December 12th, Neylan of one Star wrote to its subsidiaries on December 19, 1935, concerning the relation between the absence of price filing and the lack of land grant rate information, among other things:

"In the absence of price filing the one thing which the industry will feel is the lack of information concerning land grant rates and Government destination costs. To offset this it has been proposed that all land grant rates be published by the Freight Rate Bureau and we have been asked to cooperate to the extent of making known to the Cement Institute in Chicago the existence of any land grant rates applying from any of the mills in your respective districts to any destinations where the Government has in the past purchased cement. Upon receipt of this information from all sources the Cement Institute, probably through the Rate Bureau, will disseminate the information to all members of the industry."[9]

On December 19, 1935, Upperman, Traffic Manager of Southwestern (El Paso), wrote to Reiter in response to the

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[8] Com. Ex. 948-2 A-& B.

[9] Com. Ex. 282 B.

executive letter of the 12th and provided available land grant rate information as follows:

> "We are attaching hereto a schedule of Land Grant Rates, including the emergency charge, prepared by this office for the Southwestern Portland Cement Company, together with explanation of the references contained therein. The per barrel rates are based on 380# to the unit and should not be used in figuring prices for shipments in bulk.
>
> So far as concerns the rates established by this member company in connection with references (c) and (d), it should be stated we do not believe then to be the same as would be established by either the Government or the carriers, they being oftentimes in dispute themselves in these matters; but we believe them to be as nearly correct as may be figured by a commercial concern. The Institute may already have knowledge of the fact that Circular 5, referred to in the attached schedule is not for general distribution to the public but is prepared by the Quartermaster General for information of the Government and the carriers only, although some copies have reached 'outside' hands the fact remains this circular is not for public distribution.
>
> If any additional information in connection with either the enclosed schedule or the subject matter is desired, do not hesitate to call upon this office."[10]

On December 30th, Gubernator, General Traffic Manager of Lehigh wrote to Reiter in response to the executive letter of December 12th and provided available information, saying:

> "We have compiled a statement in the manner requested by you, and copy is attached hereto. I might mention, however, that this statement in some cases shows two or three rates as being secured from the railroad, different factors being quoted by different railroads. For your record we have shown all of the rates which we had secured. Some of the railroads have also quoted on the basis of inclusion

[10] Com. Ex. 841 B.

of the emergency charge and others on the basis of excluding this charge. Our method of handling when the rate quoted did not include the emergency charge was to apply the percentage relation between the commercial rate and the net land grant rate quoted and apply that percentage to arrive at the emergency charge to be added.

It will be our purpose upon securing other land grant quotations to keep your office advised."[11]

The enclosures showed land grant rates to points in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North and South Carolina and Tennessee and were distinguished by lettering as follows:

"(a) Net land grant rate in cents per cwt., exclusive of emergency charge.

(b) Net land grant rate in cents per cwt., including the emergency charge

(c) Railroad quotation

(d) Government quotation

(e) Mileage prorate."[12]

On January 2, 1936 Reiter wrote to the members concerning the status of the compilations and the distribution of information then available, as follows:

"This supplements our letters of December 12 and 19 on the same subject. So far an insufficient number of land grant rates have been filed with this office to warrant our publication of a schedule of such rates for various states but it is still our intention to do so when sufficient rates are at hand.

In the meantime it is our purpose to notify interested Members of individual current land grant rates filed from time to time with this office. For this purpose we request all Members to furnish us a list

[11] Com. Ex. 837 A.

[12] Com. Ex. 837 B-L.

of states in which they desire to be advised of all land grant rates filed with us. Such notifications will be sent by mail the same date filings are received. If notice is desired by wire please authorize us to send such information by wire collect as we anticipate a considerable number of such filings and a general distribution of these filings by wire has not been contemplated by our budget.'"[13]

In another executive letter dated January 2, 1936, Reiter wrote to the members regarding the purpose of compiling land grant rates, as follows:

[Italicized part quoted in Fdgs. Par. Eight (n)]

"This letter, supplementing our letters on the same subject dated December 12 and December 19, is prompted by certain inquiries from member companies as to the purpose of the Cement Institute in attempting to compile the best available information on current land grant rates.

[*Briefly stated, our purpose in this regard is identical with the purpose which we have pursued for many years through our Traffic Bureaus in compiling and distributing information to the members regarding commercial freight rates. In other words, it is recognized that the cost of transportation is a necessary element for each manufacturer to consider when he quotes a price or files a bid on any other basis than f.o.b. mill. The compilation of freight rates provides a convenient instrument for the cement manufacturer in determining a delivery price, whenever he chooses to quote such a price.*"][14]

The same letter then quoted from the opinion of the United States Supreme Court (by Mr. Justice Stone) in *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, to show that the Court had "ap-

[13] Com. Ex. 94.

[14] Com. Ex. 95.

proved" the compilation and circulation of books on commercial freight rates. The letter continued:

> "The above quotation is inserted merely as a reminder that our long established practice in using freight-rate books on commercial freight tariffs has been approved by the Supreme Court. As indicated by the Court it has long been an established trade practice in this industry for companies to sell at a delivered price, although it is recognized that the manner of selling cement still lies wholly within the province of any individual company."

The letter then explained the nature of land grant rates and their connection with bidding "Government Destination Cost" during the N.R.A. code period, and with continuing problems relative to Government business as follows:

> "*Land Grant Rates*: It is well recognized that land grant rates are special freight rates which are available only to the United States Government and on certain railroads. Furthermore, in order that the Government may secure the benefit of such land grant rates it is necessary for the Government to take title at the mill and to use a Government bill of lading.

[Italicized part quoted in Fdgs. Par. Eight (n)]

> [*During the N.R.A. code period when all cement manufacturers were required to file their prices and terms of sale, the methods which the different companies followed in bidding on Government business was a matter of public record. It became evident that many of the companies labored under difficulties, since it seemed that they were unwilling to deviate from their long established practice of quoting destination prices and yet bids of this nature would not assure to the Government the benefit of the land grant rates.*
>
> *In the Code days, companies which did not desire to quote f.o.b. mill prices to the Government filed their bids with certain control clauses, and as these conditions were made public other companies either*

adopted them or made certain changes. The result was that it became a widely prevalent practice, in the case of bids to the United States Government, for cement companies to quote what was called a 'Government Destination Cost.'

In bidding a Government Destination Cost it was the practice of the individual company to quote a figure which was based upon the mill net return (that the company was satisfied with in the particular case) to which was added the land grant or special rate to the destination. In the absence of exact information regarding the applicable land grant rate the company added its best approximation of that rate. The result was the so-called 'Government Destination Cost', which was filed as a bid on the condition that the Government could determine the bidder's mill price (for purposes of invoicing) by subtracting the actual land grant rate or some other specified amount.

The so-called open price plan is no longer operative in the cement industry, so that it will no longer be possible for the Cement Institute to handle the filing of prices or of Government Destination Costs. Nevertheless, the problems which arose under the open price plan continue to exist.]

It will be seen that any cement company which desires to quote on Government business in any manner other than upon a f.o.b. mill basis must necessarily take into consideration the land grant rates which are applicable. Since this information continues to be of great importance to the members of the Cement Institute it will be our effort, in all proper ways, to assist the members in securing information regarding land grant rates.

It is recognized that the chief difficulty with this subject is the lack of any official publication of land grant rates. By statute and by conferences between the Interstate Commerce Commission and the railroads, certain formulas have been devised for determining land grant rates involving differing percentages of the commercial tariffs. These formulas are fairly well known to the cement industry, but in applying them there is constant difference of opin-

[Italicized part quoted in Fdgs. Par. Eight (n)]

ion, and the practical result is that the applicable land grant rate is the computation which is made by the Government. [*Therefore, it is frankly admitted that, except in rare instances where the Government will make such computations and publish them in advance, it is not possible for anyone to have accurate information regarding the land grant rate applicable at a particular time between two particular points.*

Nevertheless, the method of computing such land grant rates is so well known that the discrepancy between the figure arrived at by the Government and the figure arrived at by the railroads or others is negligible. For all practical purposes it is possible to secure estimated land grant rates which are practically identical with the actual ones. For this reason a careful computation of land grant rates amounts to factual data rather than to fanciful or arbitrary figures.

It is further recognized that it is a considerable burden for any individual company to secure information regarding all applicable land grant rates. It is obvious that cooperation of all of the companies through the Institute will lessen this burden on each and should make it possible to secure the factual data more promptly and to make it available for the assistance of each company.]

Accordingly, we have requested that each member of the Cement Institute should furnish our office with up-to-date information regarding the land grant rates applicable from different mills to points of destination where it is likely that cement bidding will be involved. We know that this information changes from time to time, and we have asked each company to continue to send us such data. It is our intention to establish a continuous service in the hope that data of this sort will be as accurate and as up-to-date as possible and therefore of real value to the members. Furthermore, in order to avoid the distribution of arbitrary figures and in order to make it possible for anyone to check the information which we distribute, we have asked the member com-

panies to tell us the source of their information in each case. From this you will note again that our sole purpose is to deal with factual data and with current information.

We have dealt thus at length with this subject because certain requests which have come to us indicate that the problem and our intentions are not thoroughly understood by all of the members and their executives. We suggest that each company should make this letter available to every executive who has any concern with this subject."[15]

The first publication of land grant rates by the Institute issued on January 23, 1936 under the title "Schedule No. 1 of information on The Lowest Land Grant Rates on Cement in cents per 100 pounds to destinations in ALABAMA Indicating source of such information as filed with The Cement Institute". An explanation of reference marks was set forth as follows:

"A — RAILROAD QUOTATION—
(Including the Emergency Charge)

B — GOVERNMENT QUOTATION—
(Including the Emergency Charge)

C—COMPANY FIGURES—
(Including the Emergency Charge)

D — RAILROAD QUOTATION—
(Exclusive of Emergency Charge)

E — GOVERNMENT QUOTATION—
(Exclusive of Emergency Charge)

F — COMPANY FIGURES—
(Exclusive of Emergency Charge)."[16]

[15] Com. Ex. 95.

[16] Com. Ex. 841 I.

In an explanation of Land Grant Rate Schedules as thus issued, it was stated:

[Italicized part quoted in Fdgs. Par. Eight (n)]

"There is no official publication of all current applicable land grant rates. For the convenience of members, The Cement Institute compiles information from many sources concerning land grant rates, to aid cement companies in giving the U. S. Government the full benefit thereof.

It is impracticable to indicate the specific source of information about each figure in a brief compilation, but there sources are on file in The Institute Office. However, symbols indicate the general nature of the source of such information.

Where a symbol (B or E) indicates 'Government Quotation' it means that the figure was computed by some department of the United States Government, and that in some cases it represents the actual figure which has been used by the Government in past transactions. Where the symbol (A or D) indicates 'Railroad Quotation' it means that the figure was furnished by a railroad office. Where the symbol (C or F) indicates 'Company Computation' it means that the figure was computed by the shipper on the basis of its past experience.

[*The term The Lowest Land Grant Rates indicates that in many instances the current applicable land grant rate between two given points was reported variously by different sources, and that the figure included herein was the lowest land grant rate reported to The Institute on the date of issuing this schedule.*

In no case does the figure represent a computation by The Cement Institute, which merely serves as a medium for exchanging information. Furthermore, there is no assurance that the stated land grant rate will be the exact one which will be computed and used by the U. S. Government in any particular case."][17]

[17] Com. Ex. 841 J.

The initial page of this Schedule also appears in the record.[18]

On August 14, 1936, following receipt from Ash Grove of a schedule of land grant rates to Newkirk, New Mexico,[19] Reiter sent a letter addressed to fifteen western companies stating: "Land grant freight rates in cents per hundred pounds as shown below have been filed with this office. Such rates are stated to include Emergency Charges authorized by I.C.C. and are also the lowest on file in this office from the point of origin to destinations shown unless otherwise indicated." Rates were then stated from seven points to Newkirk, New Mexico, giving as "Authority" the phrase "Company Figure."[20]

The Traffic Manager of Ideal wrote to Reiter eight days later questioning the rates in this letter:

> "I am unable to find anyone who can figure anywhere near such results and I believe you should investigate promptly, as these figures should undoubtedly be raised materially."[21]

To this, Reiter replied on August 24th, explaining the function of the Institute in distributing filed information:

> "I am sure that you understand that we do not figure any land grant rates but for the convenience of our members accept filings by them of such rates and distribute the information so filed with us to all interested members, giving the source of such land grant rates as filed with us. Thus you may see from our notice dated August 22 concerning land grant rates to Newkirk, New Mexico, that the Santa Fe Railway is the source of various land grant rates

[18] Com. Ex. 841 K.

[19] Com. Ex. 841 P-Q.

[20] Com. Ex. 841 R.

[21] Com. Ex. 841 S.

from California destinations which are lower than those filed stated to be Government figures."[22]

On December 4, 1936, Universal Atlas wrote Blocher, the Manager of the Chicago Bureau, in connection with a bid to be opened on December 8th, regarding land grant rates from Jacksonville to two points in Florida which it had secured from a railroad. The letter stated:

"The U. S. Treasury Department, State Procurement Office, Jacksonville, Florida will open bids December 8 for delivery of cement as shown at the following destinations:

2,800 barrels paper fob Fort Myers, Florida
1,000 " " " Bay Pines, "

We have secured from a railroad for this bidding land grant rates per cwt including emergency freight charge from shipping point to destinations as shown below:

Destination	From	Cents Per Cwt	As we figure rate Cents Per Bbl (380 lbs)
Fort Myers, Florida	Jacksonville	14.541	55.2558
Bay Pines, Florida	Jacksonville	11.408	43.3504

Using these rates, our computation indicates the Destination Cost to the U. S. Government to be as follows:

Fort Myers, Florida $2.40255 per barrel paper
Bay Pines, " $2.2835 " " " "."[23]

On the same day, Blocher, Manager of the Freight Rate Bureau, sent a letter to ten companies competing in the southeastern area, as follows:

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[22] Com. Ex. 841 T.

[23] Com. Ex. 841 HH.

"Land grant freight rates in cents per hundred pounds as shown below have been filed with this office. Such rates are stated to include Emergency Charges authorized by I.C.C. and are also the lowest on file in this office from the point of origin to destinations shown unless otherwise indicated.

Date Filed	From	To	Rate	Authority
12/4/36	Jacksonville	Fort Myers, Florida	14.541	Railroad
"	"	Bay Pines, "	11.408	"

Member filing states above rates are for use at letting of December 8th.

Date Filed	From	To	Rate	Authority
12/4/36	Boyles	McAlpin, Florida	13.186	Railroad
"	No. Birmingham	" "	13.186	"
"	Leeds	" "	14.499	"

Member filing states above rates are for use at letting of December 9th."[24]

On January 28, 1937, Reiter, General Manager, wrote to all members concerning "the advisability of terminating the exchange of information through the Institute regarding land grant rates" and its connection with the "Expiration of Emergency Freight Surcharge" on both Interstate and Intrastate freight rates, and the resulting inaccuracy of all previous computations of land grant rates on December 31, 1936. The letter said, in part:

"At the outset it was hoped that the exchange of such information would result in a file of reliable factual information—that it would constitute a compilation of actual land grant rates which might be of general value since no such compilation existed. Since the emergency freight charges expired on

[24] Com. Ex. 841 II.

December 31, 1936, all past information about land grant rates is probably inaccurate today. This change provides the occasion for terminating the experiment which The Institute has been conducting during the past year. Furthermore, the elimination of this service regarding land grant rate information fulfills the intention of the Board of Trustees, as expressed at its last two meetings that current service of The Institute should not exceed those services which had been approved by the U. S. Supreme Court in the case of Cement Manufacturers Protective Association v. United States (1924—268 U. S. 588).

Accordingly, the General Manager has instructed the Freight Rate Bureau of The Institute to cease transmitting to the members any information regarding land grant rates."[25]

On January 28, 1937, Reiter sent to the members, Executive Letter No. A-57, as follows:

[Italicized part quoted in Fdgs. Par. Eight (n)]

"You are notified that [*effective immediately The Cement Institute will discontinue the distribution of information on land grant rates*] heretofore handled by our Chicago office."[26]

Reiter testified that some of the rates filed with the Institute and distributed by it were merely company computations.[27] In reply to a question as to the purpose in compiling and distributing estimated land grant rates, he testified:

"I knew that members of the industry wanted as good information as they could get on land grant rates, and therefore I presumed of course that they

[25] Com. Ex. 885-2 R.

[26] Resp. Ex. 169.

[27] (C) Tr. 3715.

used this information in bidding to the United States Government under government destination costs."[28]

He testified concerning the "need" which the service met:

"All I can say is that it furnished the members the best information that we had available as to land grant rates which were used in bidding to the United States Government."[29]

Reiter testified that companies sending in land grant information always indicated the source thereof, namely, government quotations, rates furnished by the railroads, and computations by their own traffic managers.[30] It was not the custom of companies sending in such information to include a computation of government destination costs.[31] It was included, however, on a few occasions but the only company sending in such costs that Reiter could recall was Universal Atlas.[32]

Roberts, the Traffic Manager of Volunteer, questioned as the value of the Institute land grant rate service, testified:

"A. It gave us, in brief form, all of the rates—of the land-grant rates that had been figured from various sources, Government, railroad, and so forth, in convenient form.

Q. Well, was it the actual land-grant rate? A. Well, the actual land-grant rate, as I understand it, can only be determined between the carriers and the Government.

Q. Well, then, how did this information as to land-grant rates that had been used, or filed, help?

[28] (C) Tr. 3716.

[29] (C) Tr. 3811.

[30] (C) Tr. 16930.

[31] (C) Tr. 16931.

[32] (C) Tr. 17094.

you? A. It helped me, saved me time, at least, from figuring my own computations.

Q. And in making up your bids? A. Making up our bids, yes.

Q. It enabled you to make identical bids, did it not? A. I don't know about that. It enabled us to——

Q. It enabled you to anticipate the lowest competition, did it not? A. It enabled us to use what we thought our competitors would use, and quote.

Q. It gave you something to work with in anticipating the lowest bid by a competitor? A. Repeat that?

Q. Didn't I put it rather fairly when I put it that way? A. I guess so."[33]

Concerning the changes to which land grant rate figures were subject, Reiter testified:

"Q. And even in the case of the so-called railroad figure or Government figure, were not those figures subject to change as shipments were actually made later on? A. Let us take the most fixed of those two, namely the Government figure, and it was subject to change for two reasons. One is that the land grant mileage actually changed on such things as a relocation of the railroad, and the other point on which it changed was that some other official of the Government figured it."[34]

Hayghe, Chief of Traffic Section in the Procurement Division of the Treasury Department, who qualified as a traffic expert on behalf of the Commission,[35] testified regarding differences in computations of land grant rates that in theory there is no difference between such rates when calculated for purposes of an award and the actual figures of settlement between the Government and the rail-

[33] (R) Tr. 31986-87.

[34] (C) Tr. 3718.

[35] (C) Tr. 1829.

road. He testified further that, in practice, there may be a slight difference due to errors in computation or frequent differences of opinion. His testimony follows:

"Q. What has been your experience with reference to whether there is a difference or may be a difference between the land grant rate and when you make your calculations for the purposes of an award and the actual basis of settlement when you settle with the railroad? A. It is identical. The Government cost at destination is subject to the deduction of the lowest rate and the payment of the transportation charge is likewise based upon the actual rate.

Q. You mean the total Government destination cost is identical?

* * *

By Mr. Wooden:

Q. My question was what has been your experience with reference to whether or not the land grant rate that you use in calculating the basis of the award, whether or not it differs or may differ from the actual land grant rate which the railroads receive when the shipment is made?

* * * *

The Witness: It would be the same.

By Mr. Wooden:

Q. Well, I am satisfied of course that you either misunderstand me or I misunderstand you.

* * *

Q. Are you familiar with the Comptroller General's opinion on that subject that relates to the differences that may occur and frequently do occur between the rate which forms the basis of the settlement with the railroad and the rate which is estimated in advance? A. I am.

* * *

Q. With that in view, do you care to make any further explanation of your previous answers, or do

you want them to remain as they were? A. I think my answer requires an explanation.

• • •

The Witness: With regard to the Comptroller General's decision, I think the number is A-97400 and it so happens that that opinion was rendered in response to a case which was prepared by myself, so I know what his answer was. With regard to my answer, I said the land grant rate used in evaluating the bid is the same as the land grant rate used in the settlement. In theory, that is true. There may be some error in computation which afterwards may change the rate. In theory, my answer is yes, it is correct.

By Mr. Wooden:

Q. But in practice it does not always work out that way? A. In practice, due to errors in computation, there may be a slight difference in the land grant rate eventually determined to be the proper one.

Q. Is that in part due to differences over the divisions of the rates between land grant and non-land grant roads in such matters? A. Frequent differences of opinion, yes, sir.

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By Mr. Wooden:

Q. Mr. Hayghe, did you have some experience in the General Accounting Office before you came into your present position? A. No, sir.

Q. Did you have any experience in any office relating to claims filed by railroads? A. In the Finance Office in the War Department.

Q. In that capacity, did you find railroads filing claims from time to time about errors in the calculation of land grant rates? A. Frequently.

Q. Does your experience in that connection have anything to do with the answer you made a moment ago about the difference between the theoretical and actual application of land grant rate factors? A. Yes, sir; it did and I would like to elaborate just a

little more in my answer to that question if you will permit.

Examiner Norwood: Go ahead.

The Witness: It is an actual matter of fact that until after all the facts in transportation are known, it cannot be definitely stated what the rate on a particular shipment is going to be. There are probably too many factors there to be drawn out here.

But, for instance, at the time of the computation of a land grant rate, there may be a certain basis for dividing in the event of a joint rate—that is, the rate applying by a route of more than one carrier. Between that time and the time the shipment moves, there may be a change in divisions. There may be a correction of that land grant percentage applying between two of the points involved in the movement.

Even after all the facts are known between a given point of origin and a given point of destination, you may have as many as a dozen or more different bases for dividing your through rate and as a matter of actual fact—this has not been put to an actual test but I would be willing to do so—you might give the same problem of the net rate to a half dozen equally qualified rate men and get half a dozen different answers because all might not work out the rate on the same basis as the others."[36]

[36] (C) Tr. 2260-66.